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132-204

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~370.~~ 96

JOHN B. WINTERS, FRANK GANAHL, AND JOHN WINKELBACH, APPELLANTS,

vs.

GEORGE F. SETTLE AND JACOB RESSER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED SEPTEMBER 29, 1886.

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a Supreme Court Idaho Territory. January Term, A. D. 1886.

GEORGE F. SETTLE *et al.*, Pl'ffs & Respondents,

vs.

JOHN B. WINTERS *et al.*, Def'ts & Appellants.

Appeal from second judicial district, Alturas county.

Sutherland & McBride, Bennett, Harkness & Kirkpatrick, att'ys for appellants; Huston & Gray, R. Z. Johnson, att'ys for respondents.

Filed Oct. 1st, 1885.

A. L. RICHARDSON, *Clerk.*

1 *Complaint.*

In the District Court of the Second Judicial District of Idaho Territory in and for the County of Alturas.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants.

The plaintiffs complain and allege—

That on the 19th day of September, 1882, the plaintiffs were, and for a long time prior thereto had been and still are, the owners of and in the possession, as hereinafter shown, of that certain mining property, claim, lead, or lode situated in Bear Creek mining district, Alturas county, Idaho Territory, known and described as the "Vishnu," being 800 feet in length by 200 feet in width, in, upon, and along said lode or ledge.

2nd.

That, so being the owners and in the possession of said property, the plaintiff- did, on the said 19th day of September, 1882,
2 execute to said defendants a certain agreement in writing, whereby they licensed said defendants to work said "Vishnu" mine and other mining property therein described, upon the terms and conditions in said agreement expressed, to and until the 27th day of Nov., 1883, a copy of which agreement, marked Exhibit "A," — hereto annexed and forms a part of this complaint.

3rd.

That in and by said agreement, as well as by a supplemental agreement, a copy of which is hereto attached, marked Exhibit "B," and made a part of this complaint, it was stipulated and agreed by and between the plaintiffs and defendants that said defendants should work said mine during the period aforesaid at their, the said defendants', own expense; that they should keep the said prop-

erty free and clear of all liens and incumbrances for work or labor and should pay to the plaintiffs, as a consideration for the privilege of working said mine, one-half of the gross proceeds therefrom.

4th.

That it was further stipulated and agreed by and between
3 the plaintiffs and defendants and was so expressed in said written agreement, Exhibit "A," that if the said defendants should pay to the plaintiffs, on or before the 27th day of Nov., 1883, out of the proceeds of said mine or otherwise, the sum of forty thousand dollars ($40,000), then the plaintiffs should thereupon, by good and sufficient deed, transfer and convey to defendants the mining property in said agreement described, and it was understood and agreed by and between said parties that in the event of such payment of said sum of forty thousand dollars ($40,000) by defendants to the plaintiffs within the time specified any and all sums theretofore received by the plaintiffs from the defendants as consideration for the use and working of said mine as aforesaid should be credited upon and deducted from the said sum of forty thousand dollars ($40,000).

5th.

That it was stipulated and agreed between the plaintiffs and defendants in and by the said agreement, marked Exhibit "A," that if the said defendants should fail to fulfil and comply with any of
4 the covenants or agreements or conditions therein expressed and by them to be done or performed or should not, on or before the said 27th day of Nov., 1883, pay to the plaintiffs said sum of forty thousand dollars ($40,000) as aforesaid, then the said defendants should lose and forfeit all rights, claims, demands, or privileges under or by reason of said contract, and should no longer enter upon or work said properties or any part thereof.

6th.

That said "Vishnu" mine produces large quantities of high-grade ores carrying gold and silver of great value; that under and by virtue of said agreement, Exhibit "A," and the license thereby granted the defendants proceeded to work said "Vishnu" mine, and during the period embraced in said agreement continued to work and mine the said premises and extract large quantities of said ore.

7th.

That on the 24th day of Nov., 1883, the plaintiffs, at the request of defendants and for a consideration therein expressed, did make and execute to the defendants a certain agreement in writing, wherein
5 and whereby they extended the said agreement, so as aforesaid made on the 19th day of September, 1882, to the 27th day of December, 1883, a copy of which last-mentioned agreement

is hereto annexed, marked Exhibit "C," and forms a part of this complaint.

8th.

That the period during which said defendants were entitled to work said mine under said agreement, Exhibit "A," and said extension thereof, Exhibit "B," and within which they were to have the option of purchase of said property by the payment of said sum of forty thousand dollars ($40,000) expired on the 27th day of December, 1883, and said defendants have failed to pay the said sum of forty thousand dollars ($40,000) out of the working of the said mine or otherwise, and the whole sum paid by defendants to plaintiffs under said agreements amounts to the sum of twenty-one thousand dollars and no more, and the same was all realized out of the working of said mine and was not in excess of the moiety of the gross proceeds of said "Vishnu" mine due plaintiffs under the said agreement for the license to work the same as aforesaid.

9th.

6 That, notwithstanding the expiration of the time stipulated and agreed to in said agreements as aforesaid and the failure of defendant- to make payment, as in and by said agreements stipulated *and* to be paid, defendants *defendants* continue to work said "Vishnu" mine and to extract and remove therefrom large quantities of rich and valuable ores bearing gold and silver, to the great and irreparable injury of the said premises.

10th.

That said defendants are impecunious and insolvent, totally irresponsible and incapable of responding in damages in any sum whatever; that during the thirty days' extension of time provided for in Exhibit "C" said defendants extracted and removed from said "Vishnu" mine large quantities of gold and silver bearing rock or ore of great value, for a part of which they have failed to account to plaintiffs; that said mine as now opened exposes a very rich chimney of ore of great value, and defendants threaten to work out and extract the ore therefrom and to waste and destroy the substance of said mine, and plaintiffs verily believe they will do so, to the irreparable damage of plaintiffs, unless restrained by the order of this court.

7 Wherefore plaintiffs pray the judgment and decree of this court—

1st.

That defendants be restrained from entering upon or interfering with the possession of said premises or from mining or extracting from said mine or removing from said mine or the dump thereof any rock or ore during the pendency of this action, and that on the hearing said order be made final.

2nd.

That defendants come to an accounting with plaintiffs of and concerning any and all rock or ore taken from said mine by them or either of them, and that they pay over to plaintiffs a moiety thereof, and that the amount found to be due the plaintiffs upon such accounting be decreed to be a lien upon any and all rock or ore taken from said mine and remaining in the hand- of defendants and now upon the dump of said mine or elsewhere, and for such other and further relief as to the court may seem just and agreeable to equity.

R. Z. JOHNSON, &
HUSTON & GRAY,
Attorneys for Plaintiffs.

8 EXHIBIT "A."

This indenture of lease, with the privilege of purchase, made and executed this 19th day of September, A. D. 1882, by and between G. F. Settle and Jacob Reeser, of Rocky Bar, Alturas county, Idaho Territory, parties of the first part, and John Winkelbach, of said Rocky Bar, and John B. Winters and F. Ganahl, of the town of Hailey, I. T., parties of the second part, witnesseth:

That the said parties of the first part, for and in consideration of one dollar to them in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby covenant and agree to and with the said parties of the second part, their heirs or assigns, as follows, to wit:

The said parties of the first part hereby grant, demise, and lease to the said parties of the second part the following-described property, situate, lying, and being near Rocky Bar, Alturas county, I. T., to wit: All that certain quartz-lode mining claim known as the "Vishnu" and consisting of an undivided eight hundred feet; also all of that certain quartz-lode mining claim, consisting of fourteen hundred (1,400) feet, on that certain vein of quartz containing the precious metals, known as the "Idaho" and being the discovery claim on said "Idaho" ledge; also twelve hundred feet (1,200) on the "Golden" or "Sierra" quartz ledge; also twelve hundred (1,200) feet, more or less, on the "Chauncy" quartz ledge or mine; also the "Mountain Tunnel" and tunnel right. All of the above mines and quartz-lode claims commence at Quartz gulch and run thence easterly towards Dixie gulch—the "Vishnu," eight hundred feet (800); the "Idaho," fourteen hundred feet (1,400); the "Sierra" or "Golden," twelve hundred feet (1,200), and the "Chauncey," twelve hundred feet (1,200), more or less—and are situated on the north side of Bear creek, on Idaho Hill; also four hundred feet (400) in the "Wizzard King" quartz lode, commencing at Dixie gulch and running westerly four hundred feet (400); also the mill site at the mouth of Quartz gulch, with blacksmith shop and cabin thereon; all of the above-described property being situate at the upper end of Rocky Bar, in Bear Creek mining district, Alturas county, Idaho Territory, the "Vishnu" lying highest upon Idaho Hill, and

9

below it the "Idaho," and next below the "Golden" or "Sierra" and the "Chauncey," being all the group of mines on said Idaho Hill south of Quartz gulch; also that certain engine and
10 boiler, known as the old Idaho engine and boiler, now lying on said Idaho mill site, from the 27th day of November, 1882, on the expiration of a certain lease of the "Vishnu" and "Idaho" mines executed and delivered by the parties of the first part to Thomas Kitto, Charles Davey, and S. Parkinson, or in the event of an assignment of said lease by said lessees to the parties of the second part before the said 27th day of November, 1882, then from the date of such assignment, until the 27th day of November, 1883, upon the following terms and conditions: The said parties of the second part, so long as they shall deem fit, to hold said property and to mine and extract ore therefrom and to pay to the said parties of the first part one-half of the gross proceeds in manner hereafter specified, and when the sum of forty thousand dollars ($40,000) shall have been paid, either out of the proceeds of the mines or otherwise, by the said parties of the second part to the parties of the first part the said parties of the first part hereby covenant and agree, for themselves, their executors, administrators, and assigns, to and with said parties of the second part, their heirs and assigns, to convey
11 to them, by good and sufficient deed, all of the above-described property free and clear of all incumbrances upon such payment: Provided, That said sum of forty thousand dollars ($40,000) shall have been paid on or before the 27th day of November, 1883.

And the said parties of the second part hereby covenant and agree to enter upon said properties and to mine and extract ore from the same so long as they shall find it profitable; to do the work in a proper and workmanlike manner and at their own cost and expense, and to hold and keep said property free and clear of all cost, charge, or lien for the working of the same, and out of the gross proceeds of said mines to pay one-half thereof as fast as taken out to the said parties of the first part in the manner hereinafter specified, and upon the expiration of the term hereby granted to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless on or before said 27th day of November, 1883, the said sum of forty thousand dollars ($40,000) shall have been paid, and in the event of the said parties of the second part or their assigns failing to comply with either of or any of the foregoing covenants or any covenant, promise,
12 or thing herein contained on their part to be done, kept, or performed, that then it shall be lawful for said parties of the first part to re-enter, possess, and enjoy the above-described property and premises and every part thereof; and the said parties of the second part hereby agree, in the event of such non-performance on their part, to surrender possession of said premises upon demand by said parties of the first part claiming their right to re-enter.

It is hereby mutually covenanted and agreed by and between the parties to this instrument that the said parties of the first part shall have the right at all times of inspecting the said mines above de-

scribed and all mining operations and work thereon; that the said parties of the second part shall have the right at any time to stop work on said mines when they shall find or deem the same unprofitable; that in working said ores at each clean-up the said parties of the second part shall and will furnish a true account of all ore extracted and milled and of all bullion received to the said parties of the first part; that in milling said ores so taken from said property the said parties of the first part, if they so desire, shall have
13 an equal right with the said parties of the second part in milling said ores, cleaning and retorting the same, weighing and storing the bullion, until the said parties of the second part receipt to them for the one-half of the gross proceeds, it being expressly understood that upon each and every clean-up the said parties of the second part are to receipt to the said parties of the first part that they own one-half of the same, and that the said parties of the second part hold the same for them, and the said parties of the second part are then to dispose of the bullion to the best advantage and pay to the parties of the first part one-half of the proceeds thereof, in money, currency, or coin, and upon such payment the parties of the first part will credit said purchase price of forty thousand dollars ($40,000) with the sum so received, and, lastly, that in no event shall the said properties above described or any part thereof be held for any claim, cost, charge, or lien for working the same by the parties of the second part under this instrument, but that all such work shall be done at the expense of the said parties of the second part solely and alone; and the said parties of the first part, for themselves, their
14 executors, administrators, and assigns, hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, to convey by good and sufficient deed all of the above-described properties free and clear of all incumbrances to them, the said parties of the second part, or their assigns at any time upon the payment to them, the said parties of the first part, of the sum of forty thousand dollars ($40,000), either out of the proceeds of the mines or otherwise, on or before November 27th, 1883, in the manner hereinbefore specified by the said parties of the second part or their assigns; and it is hereby expressly and mutually covenanted and agreed that this covenant shall be taken, held, and deemed a covenant real running with and binding the land.

In witness whereof the said parties have hereunto set their hands and seals this 10th day of September, 1882.

(Signed) GEO. F. SETTLE. [SEAL.]
JACOB REESER. [SEAL.]
JOHN WINKELBACH. [SEAL.]
JNO. B. WINTERS. [SEAL.]
F. GANAHL. [SEAL.]

Signed, sealed, and delivered in presence of—
SOL. NEWCOMER.

15 EXHIBIT "B."

We, the undersigned, in consideration of the execution and delivery to us of a certain lease, with the privilege of purchase, of the "Vishnu" and "Idaho" mines, and of other property of even date herewith, by Geo. F. Settle and Jacob Reeser, hereby covenant and promise to have each and every man employed by us in working said mines to sign the following contract, viz.: In consideration of my being employed by John Winkelbach, J. B. Winters, and F. Ganahl, the lessees of the "Vishnu," "Idaho," and other mines, I hereby covenant and agree to look alone to said lessees for my pay, and hereby waive all rights or claim that I may have in law or equity against the property or the owners thereof, G. F. Settle and J. Reeser.

Witness our hands and seals this 19th day of September, 1882.

(Signed) F. GANAHL.
JNO. WINKELBACH.
JNO. B. WINTERS.

Signed, sealed, and delivered in presence of—
SOL. NEWCOMER.

16 EXHIBIT "C."

In consideration of the extension of the time of the above instrument for thirty (30) days or until and including December 27th, 1883, we hereby consent and agree to take a deed for thirteen hundred and sixty-seven and one-sixth (1,376⅙) feet of the Idaho ledge instead of fourteen hundred (14,000) feet, as covenanted in the above instrument, and to pay interest at one (1) per cent. per month on the balance of the purchase-money from now until December 27th, 1883, or any time it is paid prior to that date.

Witness our hands and seals this 24th day of November, 1883.

(Signed) F. GANAHL. [SEAL.]
JOHN WINKELBACH. [SEAL.]
JNO. B. WINTERS. [SEAL.]

In consideration of the above covenants we hereby extend the time on the within instrument until and including December 27th, 1883.

Witness our hands and seals this 24th day of November, 1883.

(Signed) GEO. F. SETTLE, [SEAL.]
By V. S. ANDERSON, *Ag't.*
J. REESER. [SEAL.]

17 TERRITORY OF IDAHO, } ss:
County of Ada, }

George F. Settle and Jacob Reeser, being severally duly sworn, each for himself deposes and says that he is one of the plaintiffs in the above-entitled action; that he has heard read the foregoing

complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his own information or belief, and as to those matters that he believes it to be true.

GEO F. SETTLE.
J. REESER.

Subscribed and sworn to before me this 2nd day of February, A. D. 1884.

A. L. RICHARDSON,
Clerk Dist. Court,
By SOL. HASBROUCK, *Deputy.*

18 (Endorsed:) District court, county of Alturas. Geo. F. Settle and Jacob Reeser, plaintiffs, *vs.* Jno. B. Winters, Frank Ganahl, and John Winkelbach, defendants. Complaint. Filed Feb. 4th, 1884. A. L. Richardson, clerk. Huston and Gray and Richard Z. Johnson, attorneys for plaintiffs.

19 *Demurrer to Complaint.*

TERRITORY OF IDAHO:

In the District Court of the 2nd Judicial District.

GEO. F. SETTLE and JACOB REESER
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH.

COUNTY OF ALTURAS, *ss:*

And now come the above-named defendants, John B. Winters, Frank Ganahl, & John Winkelbach, & demur to the complaint of the above-named plaintiffs, hereinbefore filed, & for grounds of demurrer allege—

1st. That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendants ask to be hence dismissed with their costs.

Dated Hailey, Feb. 21st, 1884.

FRANK GANAHL,
In Pro. Per.
L. VINEYARD,
Att'y for Defendants.

20 (Endorsed:) In the district court, 2nd judicial district, county of Alturas, Territory of Idaho. Geo. F. Settle & Jacob Reeser *vs.* Jno. B. Winters *et al.* Demurrer. Filed Feb. 21st, 1884. A. L. Richardson, clerk, by E. E. Richards, deputy.

21 *Order Overruling Demurrer.*

In the District Court, Second Judicial District of Idaho Territory, in and for Alturas County.

Present: Hon. Case Broderick, presiding judge.

June Term, 1884.

SATURDAY, *June* 21*st*, 1884.

GEO. F. SETTLE *et al.*
vs.
JOHN B. WINTERS *et al.* } Civil No. 60.

On this day the court announced its decision on the demurrer to complaint herein, heretofore argued and submitted.

Ordered, That said demurrer be, and the same is hereby, overruled, and that def'ts have until July 1st to answer.

On motion of pl'ffs' attys, ordered that said plaintiffs have leave to amend the complaint herein.

22 *Amended Answer.*

In the District Court of the Second Judicial District of Idaho in and for Alturas County.

GEO. F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants.

The said defendants, answering the plaintiffs' complaint filed herein, admit the making of the contract alleged in said complaint, and copies of which are annexed thereto, marked, respectively, Exhibits "A," "B," "C."

The defendants deny that said plaintiffs, on the 19th day of September, 1882, were or at any time since have been or are now the owners, or that either of them was then or has since been or now is the owner, free and clear of incumbrances, or qualified to convey the "Vishnu" mining claim mentioned and described in said complaint, according to said contract marked Exhibit "A;" and these defendants allege, on information and belief, that said plaintiff,

23 Reeser, executed a mortgage and thereby mortgaged, on the 15th day of June, 1881, to one A. J. Pfeiffer two hundred sixty-six and $\frac{2}{3}$ feet of said "Vishnu" mining claim for the principal sum of $7,372.54 and interest; that said mortgage was, on the same day, recorded in the office of the recorder of said Alturas county, in Book A of Mortgages, on page- 378, 379, & 380, and still remains on record uncancelled and wholly unsatisfied; that these defendants or one of them is owner of $32\frac{2}{3}$ feet, undivided, of the Idaho

claim mentioned in said contract marked Exhibit "A," being the number of feet and the same portion of said mining claim remitted by said contract, Exhibit "C," and by reason of said defendants or one of them owning said feet they or he is tenant in common with said plaintiff in said mining claim.

The defendants, on information and belief, deny that either or both of said plaintiffs owned, free and clear of incumbrances or otherwise, on the 19th day of September, 1882, or since that time, the "Golden" or "Sierra" quartz ledge, the "Chauncey" quartz ledge, the "Wizzard King" quartz lode, the "Mountain Tunnel," or the mill site described in said contract.

24 And these defendants deny that the said plaintiffs were or that either of them was, at the commencement of this action, in possession of the "Vishnu" mining claim, or that they are or either of them is now in possession thereof.

These defendants also deny that said contract marked Exhibit "A" was a license or a lease, and aver that it was a contract of sale at their option; that they immediately after the execution of said contract took possession of the properties therein described, pursuant thereto, as purchasers, then and thereby exercising their option to purchase the said properties; they agreed to pay no rent, and a reasonable rent or compensation for the right to work and mine said properties during the period mentioned in said contract would not exceed one-fourth of the gross proceeds of the ore extracted therefrom.

These defendants deny that the periods during which these defendants were entitled to work said mines or to complete their purchase thereof under said contract expired on the 27th day of December, 1883, or that the said contract of sale has been determined or ended. Said plaintiffs from time to time, during the period

25 mentioned in said contract, assured the defendants and gave them to understand that they, the said plaintiffs, only wanted the money mentioned in said contract of sale and were willing to allow and consent to a reasonable time to pay the same with proceeds of ores taken from said mining properties; and these defendants aver that at the expiration of said period neither party intended or did any act to determine said contract, but tacitly continued the same in force; that on the 29th day of December, 1883, these defendants paid on the purchase-money for said property and the said plaintiffs received the sum of 948.96 dollars, part of the said $21,024, and these defendants continued in possession of said properties and working the same at great expense in extracting ore and making improvements, after the 27th day of December, 1883, with the knowledge and consent of said plaintiffs; that during the period between December 27th, 1883, and February 11th, 1884, they expended about two thousand dollars in such work and improvements, and on the 20th day of January, 1884, the said plaintiff, Reeser, expressly stipulated to extend the time for the completion of said purchase under said contract for thirty days from said date.

26 That by said plaintiffs' act and contract they are estopped

from claiming that at the commencement of this action the said contract had been forfeited or determined or that time was of its essence.

These defendants allege that neither or both of said plaintiffs, at any time when there was no express agreement to extend the time for the performance of the said contract, exercised or suffered option or gave any notice of his or their intention to put an end to said contract.

These defendants aver that they have paid on the said contract, Exhibit "A," as part of the purchase price of the mining property described in said contract, the sum of $21,024.00, and they deny that the said sum was paid wholly or in part from the proceeds of ore extracted from said "Vishnu" mine, but wholly from proceeds of ore extracted from said Idaho claim, and these defendants expended at least the sum of $34,000.00 in extracting the ores, reducing, and marketing the same to raise the sum of which the $21,024.00 is the half.

These defendants deny that at the time of the commencement of this action they had failed to account to the said plaintiffs for
27 any gold or silver bearing rock or ore of great value or otherwise extracted from said "Vishnu" mining claim or from said Idaho or other claims described in said contract, Exhibit "A."

The course of the business done under said contract was as follows: Said plaintiff, Reeser, owned a mill for crushing rock and turning ores into bullion in the vicinity of said properties; these defendants employed the said plaintiff, Reeser, and his mill to reduce to bullion the ore extracted. The bullion was afterwards shipped to San Francisco, California, for market and remittances made of the proceeds according to the assay certificate of officers of the Government mint, on receipt of which payment was made to said plaintiffs. The first proceeds in the regular course for the ore taken from the mines after those accounted for came to defendants' hands since the commencement of this action, and the ore taken out prior to January 20th, 1884, and including all that have been removed from the said mines and the ore-house thereof, have been milled and reduced to bullion by said Reeser, and thereafter delivered to these defendants to be shipped to market in said California.

28 The defendants also allege that they proceeded in all that they did in working said mines after the 27th day of December, 1883, in all respects as they had done before that time for the purpose in good faith of paying said plaintiffs the contract price for said properties, and but for the inter-uption caused by this action they would, as they verily believe, have completed the payment therefor.

That prior to the filing of the answer herein, and on or about the 22nd day of June, 1884, these defendants were prepared to make a formal legal tender of the balance due on said contract, viz., about $21,000.00, and endeavored to make such tender at Hailey, in said Territory, but were prevented from doing so by the statement of the plaintiffs and each of them that they would not, nor would either of them, accept or receive said sum of money or any part thereof.

That in the cross-complaint of the defendants, filed herein Jan-

uary 30th, 1884, and on several occasions prior thereto, defendants offered and they hereby offer to perform said contract on their part by paying any amount found due and still unpaid on the same for property mentioned in said contract and which the plaintiffs can convey.

29 And defendants hereby offer to so perform said contract on their part.

These defendants deny that at the commencement of this action or at any time they committed or threatened to commit waste on said property or were doing or threatening any acts which would be detrimental to said mine or subject these defendants to damages.

These defendants deny that they are not of sufficient pecuniary ability to answer for all damages that their acts would make them liable for.

Wherefore defendants, having fully answered plaintiffs' complaint, ask that the same be dismissed, and that defendants have judgment for their costs.

SUTHERLAND & McBRIDE,
BENNETT, HARKNESS & KIRKPATRICK,
L. VINEYARD, *Def'ts' Att'ys.*

TERRITORY OF IDAHO, } *ss:*
County of Alturas, }

I, Jno. B. Winters, being duly sworn, depose and say that I am one of the defendants in the above-entitled action; that I have heard read the foregoing answer; that the facts and statements therein contained are true of my own knowledge, except as

30 to those matters stated on information and belief, and as to those matters I believe it to be true.

JNO. B. WINTERS.

Subscribed and sworn to before me this 8th day of July, A. D. 1884.

A. L. RICHARDSON, *Clerk.*

(Endorsed:) In district court, Alturas county. Geo. F. Settle *et al.*, pl'ffs, *vs.* John B. Winters *et al.*, def'ts. Amended answer. Filed July 8th, 1884. A. L. Richardson, clerk. Sutherland & McBride, L. Vineyard, att'ys for def'ts. C. W. Bennett, of counsel.

31 *Amended Cross-Complaint.*

In the District Court of the Second Judicial District of Idaho Territory in and for the County of Alturas.

GEO. F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants.

Said defendants now, at the same time of filing their amended

answer to the plaintiffs' complaint herein seeking and desiring to obtain affirmative relief affecting the property to which the action relates, makes this their amended cross-complaint and alleges—

That on the 19th day of September, 1882, said plaintiffs entered into a contract in writing with these defendants for the sale by said plaintiffs to said defendants of certain mining claims and personal property therein described, among which claims were the "Vishnu" and "Idaho," situate in Bear Creek mining district, Alturas county, in said Territory, which contract is still in force and unre-
32 -cinded between said parties; a true copy of said contract is annexed to the original cross-complaint filed herein and marked Exhibit "A," and is now made part of this amended cross-complaint.

That immediately after the execution of said contract these defendants bought in the outstanding lease mentioned therein at an expense of five thousand dollars and took possession of the properties described in said contract and exercised the option to purchase the same, vested in them under — by virtue of said contract, of which the said plaintiffs had immediate notice; that said defendants at once commenced work on said Idaho mining claim mentioned in said contract, prospecting for ore and developing the same; that they continued diligently thereafter to work the same until about the 11th day of February, 1884; that during said period they expended on said mining claim in development work & in improvements thereon and for repairs and preservation thereof the sum of thirty-four thousand dollars, and thereby enhanced the value of said property to that amount; that during the same period these defendants paid to said plaintiffs twenty-one thousand and twenty-four dollars on account of and on part payment of the purchase-money
33 for said property contracted in and by said contract to them, and the said sum was receipted for by said plaintiffs accordingly; that the time stated by said contract for the completion of the payment and the conveyance of said property has been changed and delay mutually acquiesced in by the parties, for these defendants allege that on the 24th day of November, 1883, a supplemental agreement was entered into by and between said parties extending the time to the 27th day of December, 1883, a copy of which contract is annexed to the original cross-complaint filed herein, marked Exhibit B, and is made a part of this amended cross-complaint; that at the expiration of said period neither party intended or did any act to determine said contract, but tacitly continued the same in force; that on the 29th day of December, 1883, these defendants paid on the purchase-money for said property and the said plaintiffs received the sum of $948.96 *dollars*, part of the said $21,024; that these defendants, being still in possession as aforesaid, continued thenceforth, as before, to work on the said Idaho mining claim a large force of men in the said development work and to obtain the means of completing said purchase; that said continued possession and work were with the knowledge, acqui-
34 escence, and consent of said plaintiffs, and proceeded, without any objection whatever by them or either of them,

and in and about such continued work, after said Dec. 27th, 1883, these defendants expended the sum of two thousand dollars; that after said 27th day of December, 1883, the defendants, by the development of the said mine as aforesaid, opened valuable ore bodies at depth, thus showing much greater value than had previously been known to exist therein, and on the 20th day of January, 1884, said plaintiff Reeser expressly extended the time to [for] these defendants to comply with their part of said contract for thirty days from said date, the said plaintiff Settle not objecting or in any manner or by any act dissenting until and except by the bringing of this original action; that during the month of January, 1884, gold-bearing rock to a considerable amount was extracted from said Idaho mining claim by these defendants and milled by said plaintiff Reeser and the bullion delivered by him to these defendants to be shipped and marketed precisely as all the rock taken from said mine prior to that time had been milled and the bullion therefrom disposed of; that ever since the making of said contract the
35 said defendants have been ready, willing, and desirous of receiving conveyance of said property, according to the intent and meaning of said contract, to make payment of the purchase-money mentioned in said contract and as modified by a supplemental agreement made between said parties on the 24th day of November, 1883, a copy of which is annexed to the original cross-complaint filed herein and marked Exhibit B and now made part of this amended cross-complaint; and these defendants are still ready and willing and hereby offer, as heretofore they have frequently offered, to make such payment.

These defendants further allege that said plaintiffs at no time since the making of said contract have been and are not now able to make conveyance, as required by said contract, of all the properties therein described and thereby contracted as aforesaid to be sold to these defendants, because all the mining claim described in said contract as the contracted property, including the Montana tunnel and mill site, are situate on the public domain and have never been patented and the paramount title thereto is in the United States; secondly, because, as these defendants aver on information and belief, the plaintiffs do not have even
36 the possessory title to any of the said properties, except the "Vishnu" and a portion of the "Idaho" mining claims; thirdly, because there is of record in the office of the recorder of said Alturas county a mortgage, which is a subsisting security, uncancelled and unsatisfied, for $7,272.54 and interest, executed by said plaintiff Reeser to one A. J. Pfiffer, covering and mortgaging 266⅔ feet of said "Vishnu" mining claim; and, fourthly, because, as these defendants are informed and believe, said plaintiffs are possessed of only 1,362⅙ feet of said Idaho mining claim, the remaining feet of said claim being owned as follows: 32⅚ feet by defendant Winters and five feet by one John Dunlay; and these defendants further allege that the said plaintiffs nor either of them have ever demanded payment of the balance of said purchase-money nor

offered to convey the said properties or any part thereof on payment being made.

These defendants are desirous to have the said contract, modified as aforesaid, specifically executed and performed, or if, by reason of the plaintiffs' want of title or the defect of their title to any portion of said mining claims other than said Idaho, they are not
37 able to fulfill said contract entirely and as to all said mining properties, that the said contract be specifically performed so far as said plaintiffs are able to convey title thereto, proper deduction being made from the purchase price specified in said contract; and these defendants are ready and willing and hereby offer to pay the balance of the purchase price mentioned in said contract and interest for and on the proper conveyance of all the mining properties described in said contract by good and sufficient deed, free and clear of all incumbrances, or the balance, if any, for such part of said properties as said plaintiffs can and shall convey under the decree of this court to these defendants.

These defendants further allege that a ledge or lode of valuable gold-bearing rock has been disclosed in said Idaho claim by the labor and expenditures aforesaid of these defendants, and that during the voluntary suspension of labor on said last-mentioned claim since the service of injunction obtained by said plaintiffs on their complaint in the said original action restraining said defendants from work on the said "Vishnu" mining claim said plaintiffs
38 have attempted by force to enter into the possession of the said "Idaho" mining claim and to work and mine and remove and convert to their own use the said valuable gold-bearing rock, and thus waste and extract the substance of the said claim and property and deprive the said defendants of the benefit of their said purchase and their large expenditures in the improvement and development of the said property, and these defendants greatly fear the said plaintiffs will execute their said threats unless they are restrained by this court.

Defendants further allege that on account of the commencement by these plaintiffs of said original action and the injunction therein issued and levied upon these defendants they have been greatly damaged and injured in being thereby prevented from working said Idaho mining claim; that on account of said action and injunction these defendants have been damaged in the sum of $25,000.

Wherefore the defendants pray for relief by decree as follows:

1st. That said plaintiffs may be decreed to specifically execute and perform the said contract on their part entirely, or so far as they are able; to convey the properties described therein on
39 receiving from said defendants the remainder of the purchase-money which may be equitably due therefor.

2d. That the court issue its order and injunction restraining the said plaintiffs from entering into or meddling or interfering with the said defendants' possession of said Idaho mining claim and the works and openings leading thereto, and that on the hearing the said injunction be made perpetual.

3rd. That the said defendants may have such further or other relief in the premises as they may be found equitably entitled to, besides judgment for said damages and costs.

SUTHERLAND & McBRIDE,
BENNETT, HARKNESS & KIRKPATRICK,
L. VINEYARD, *Def'ts' Att'ys.*

TERRITORY OF IDAHO, } ss:
County of Alturas, }

I, John B. Winters, being duly sworn, say that I am one of the defendants mentioned in the above-entitled amended cross-complaint, and that the same is true of my own knowledge except as to the matters therein stated on information and belief, and as to those matters I believe it to be true.

40

JNO. B. WINTERS.

Subscribed and sworn to before me this 8th day of July, A. D. 1884.

A. L. RICHARDSON, *Clerk.*

(Endorsed:) In district court, Alturas county, I. T. Geo. F. Settle *et al.*, pl'ffs, *vs.* John B. Winters *et al.*, def'ts. Amended cross-complaint. Filed July 8th, 1884. A. L. Richardson, clerk. Sutherland & McBride, L. Vineyard, att'ys for def'ts. C. W. Bennett, of counsel.

41 *Answer to Amended Cross-Complaint.*

In the District Court of the Second Judicial District of Idaho Territory in and for the County of Alturas.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants.

Said plaintiffs, answering the amended cross-complaint of said defendants in the above-entitled action filed, deny—

That said defendants, immediately after the execution of said Exhibit "A" or at any other time, exercised the or any option to purchase the or any properties described in said exhibit, and plaintiffs aver — alleged to have been performed by defendants, so far as the defendants performed the same at all, was performed by defendants upon the "Vishnu" mining claim described in said Exhibit "A" and mentioned in plaintiffs' complaint herein. Plaintiffs aver that they have no information or belief as to the amount that defend-

42

ants have expended on said properties mentioned in said Exhibit "A" or any of them, and deny that said defendants have so expended the sum of thirty-four thousand dollars or any sum equal to one-half of the net proceeds of the ores taken by defendants from said "Vishnu" mining claim, and deny that said de-

fendants have thereby, or by said expenditures or otherwise or in any way, enchanced the value of said property or of any or of all the property described in said Exhibit "A" that amount or in any amount whatever; but plaintiffs aver that said defendants, since they entered upon said premises and properties under said Exhibit "A," have taken and extracted therefrom rich gold and silver bearing rock and ore of the net value of more than forty-five thousand dollars. Plaintiffs aver that all moneys paid by said defendants to plaintiff were so paid, under the terms of said agreement, as a part of the rent or royalty reserved in and by said Exhibit "A" out of the proceeds of said premises, and were and are less than one-half of such proceeds therein reserved and covenanted and agreed to be paid by said defendants to these plaintiffs.

43 Plaintiffs aver that the time stated by said Exhibit "A" during which the defendants might have an option to purchase the premises has been changed or any delay acquiesced in by plaintiffs otherwise than by and *is* expressed in Exhibit "C," attached to the complaint of these plaintiffs in this action filed, whereby said time was extended until and including the twenty-seventh day of December, 1883, and no further; and plaintiffs deny that — or after the expiration of said period or at any other time plaintiffs tacitly or otherwise or in any way continued said contract or option to purchase beyond said twenty-seventh day of December, 1883; but, on the contrary, plaintiffs aver that they expressly refused so to do and frequently and *and* on the twenty-second day of January, 1884, at said county of Alturas, demanded of said defendants that they surrender to plaintiffs the premises taken possession of by defendants under said Exhibit "A" and then remaining in their possession.

Plaintiffs aver that said sum of nine hundred and forty-eight $\frac{95}{100}$ dollars, part of said sum of $21,024 *dollars* alleged to have

44 been paid by defendants to plaintiffs on the 29th day of December, 1883, was a part of the proceeds of ore taken from said Vishnu mine prior to the 27th day of December, 1883, and was due and payable to plaintiffs as part of the royalty reserved under and according to the terms of said Exhibit "A."

Plaintiffs aver that the possession of the defendants and the or any and all work performed or money expended by defendants upon the premises after said twenty-seventh day of December, 1883, was so held, performed, and expended by the wrongful act of the defendants and without the consent or acquiescense of plaintiffs, and during said time defendants mined and extracted from the premises and converted to their own use ores of much greater value than the money and labor expended by them, for any part of which they have failed to account with plaintiffs.

Plaintiffs deny that after said twenty-seventh day of December, 1883, by development of said mine or otherwise, defendants opened or discovered ore bodies or thus or otherwise showed greater value than had previously been known to exist therein.

45 Plaintiffs deny that on the twentieth day of January, 1884, or at any other time plaintiffs or plaintiff Reeser ex-

tended the time to said defendants to comply with their or any part of said contract for thirty days from said date or for or to any time subsequent to the twenty-seventh day of December, 1883; and plaintiffs further deny that said Reeser milled any rock taken or extracted from the premises by defendants during the month of January, 1884, or had or delivered to defendants the or any bullion from any such rock.

Plaintiffs deny that since the making of said contract or at any time prior to the twenty-eighth day of December, 1883, or for a long time subsequent to said date said defendants were ready or able to make payment of the purchase-money mentioned in said contract. Plaintiffs aver that they were at all times subsequent to the making of said Exhibit "A" and during the life thereof and at all times prior to the twenty-eighth day of December, 1883, ready, able, and willing to make conveyance, as required by said contract, of
46 all the properties therein described or thereby contracted or offered to be sold to said defendants.

Plaintiffs aver that at the time of the execution of said Exhibit "A" defendants well knew the nature of plaintiffs' title and claim to the premises therein described, and that the same were situated on the public domain of the United States and held under the mining laws of Congress, and had never been patented by the Government of the United States, and plaintiffs then and there had and from thence have had and still have the possessory title thereto.

Plaintiffs aver that at all times during the life of said Exhibit "A" and on the twenty-seventh day of December, 1883, as defendants well knew, plaintiffs were ready, willing, and able to have said mortgage mentioned in said amended cross-complaint released and cancelled of record and the premises therein described released and discharged from the lien thereof, and plaintiffs then and there offered to defendants so to do if defendants desired and were able to purchase said premises according to and under their option in said Exhibit "A," but defendants then and there acknowl-
47 edged their inability to make said purchase or to comply with said Exhibit "A," to avail themselves of the option therein.

Plaintiffs aver that they were at the time of the execution of said Exhibit "A" and from thence hitherto have been and still are possessed of all of said Idaho mining claim, and deny that said defendant Winters and said Davey are or either of them is the owner of any part thereof.

And, further answering said amended cross-complaint, plaintiffs aver that said Exhibit "A" was drawn by said defendant, Frank Ganahl, an attorney of this court, at the town of Rocky Bar, in said county, acting for and on behalf of both parties thereto; that at that time there was no other attorney-at-law or person learned in the law at or near said town of Rocky Bar; that theretofore said defendant, Ganahl, had acted as attorney for said plaintiff, Settle, and he then and there had the confidence of plaintiffs; that plaintiffs were unable to fully understand the proper legal construction of said Exhibit "A," and were compelled to rely and did rely upon said

Ganahl therefor; that it was the agreement between plaintiffs
48 and defendants that said defendants should have a lease of said premises to expire on the twenty-seventh day of November, 1883, and should pay a rent or royalty of one-half of the proceeds of the ores therefor, and should have an option to purchase the premises at any time on or prior to said date for the sum of forty thousand dollars, less the rent theretofore paid, but that upon failure to make such payment on or before said date defendants should at once and forever forfeit all right to said premises and to the possession thereof and at once surrender the premises to plaintiffs, and said defendant, Ganahl, represented to plaintiffs and assured them that such was the legal construction, force, and effect of said Exhibit "A," and, upon being asked by plaintiffs, stated to plaintiffs upon his personal and professional honor, and pledged both to plaintiffs, that unless the full sum of forty thousand dollars was paid to plaintiffs on or before said twenty-seventh day of November, 1883, defendants would, and would be bound to, at once quit and surrender up said premises, and that time was of the essence
49 of said agreement; and after such pledges and representations made as aforesaid plaintiffs, relying thereon, executed said Exhibit "A," which, but for said pledges and representations so as aforesaid made by the said defendant, Frank Ganahl, an attorney of this court, they never would have done until the same was first examined and approved by an attorney in their behalf.

That at the time of drawing said Exhibit "A" said defendant, Ganahl, had full knowledge of the title, claim, and interest of plaintiffs to the premises therein described, and was furnished with a written description of the several interests of plaintiffs in the premises, from which he was directed to copy a description into said Exhibit "A."

Wherefore plaintiffs pray that said amended cross-complaint be dismissed at cost of defendants, and that the plaintiffs may have such other and such further relief in the premises as is just and agreeable to equity.

RICHARD Z. JOHNSON AND
HUSTON & GRAY,
Attorneys for Pl'ffs.

50 TERRITORY OF IDAHO, } ss:
Alturas County, }

George F. Settle and Jacob Reeser, being severally duly sworn, says, each for himself, that he is one of the plaintiffs in the above-entitled action; that he has heard the foregoing answer of the plaintiffs to the amended cross-complaint of the defendants read and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

GEO. F. SETTLE.
JACOB REESER.

Subscribed and sworn to before me this 17th day of July, 1884.
A. L. RICHARDSON, *Clerk.*

51 (Endorsed:) In district court, Alturas county. George F. Settle and Jacob Reeser ag'st John B. Winters *et al.* Answer. to amended cross-complaint. Filed July 17th, 1884. A. L. Richardson, clerk. Service of the within by copy, by clerk, admitted this 18th day of July, 1884. L. Vineyard, one of def'ts att'ys. Huston & Gray and Richard Z. Johnson, att'ys for pl'ffs.

52 *Stipulation.*

In the District Court of the Second Judicial District of Idaho Territory in and for the County of Alturas.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, JOHN WINKELBACH, and FRANK GANAHL, Defendants.

It is hereby stipulated and agreed by and between the parties to the above-entitled action, through their respective attorneys, that said cause shall be heard upon the original and cross-complaint before the judge of said district at Boise City, I. T.

That said judge may make his findings of law and fact in said cause and file such findings and his judgment thereon; which judgment shall adjudge the right of the respective parties to an injunction in said action as well as the other questions at issue therein. A copy of said findings, conclusions of law, and judgment shall be sent by the clerk of said court by mail to the defendants' attorneys at Salt Lake City, Utah, and fifteen days after mailing the
53 same the said findings, conclusions of law, and judgment shall be filed in the office of the clerk of said court, and from the time of such filing said judgment shall have the same force and effect as though regularly entered upon a trial of said case in open court; and said judgment shall be regularly entered at the next regular term of said court as of said term, and shall have the same force and effect as though entered upon a trial at said term, and the time for taking all steps for a new trial or appeal shall run from the date of such entry, and in and by said judgment the court may determine any question as to restraining either party pending an appeal, and for a reasonable time to perfect such appeal.

SUTHERLAND AND McBRIDE,
BENNETT, HARKNESS & KIRKPATRICK,
Att'y- for Defendants.
HUSTON & GRAY AND
RICHARD Z. JOHNSON, *Att'ys for Pl'ffs.*

54 (Endorsed:) District court, Alturas county. Geo. F. Settle *et al. vs.* John B. Winters *et al.* Stipulation. Filed Jan. 27th, 1885. A. L. Richardson, clerk.

55 *Findings of Fact.*

In the District Court of the Second Judicial District of Idaho Ter-
Territory in and for Alturas County.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
ag'st
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH,
Defendants.

The above-entitled action having been tried by the court without a jury, according to the written stipulation of the respective parties on file herein, Messrs. Huston & Gray and Richard Z. Johnson appearing as counsel for said plaintiffs and J. G. Sutherland, Esq., and M. Kirkpatrick, Esqr., appearing as counsel for said defendants, and the court having heard the evidence, oral and documentary, adduced by the respective parties, plaintiffs and defendants, and the argument of the respective counsel, and being fully advised in the premises, makes the following findings of fact and conclusions of law in said action:

56 *First.—Facts Found.*

1. That on the nineteenth day of Septembr, 1882, the plaintiffs were in possession of and working by their lessees, Thomas Kitto and others, the Vishnu mining claim mentioned and described in plaintiffs' complaint, and, being so in possession, the plaintiffs on said day made and executed to the defendants the lease, a copy of which is attached to plaintiffs' complaint and marked Exhibit "A," and thereby leased and let to the defendants the Vishnu mining claim described in said complaint and other mining property (mentioned in said Exhibit "A") for a term ending November 27th, 1883, and thereby authorized and licensed the defendants to enter upon and work said Vishnu and other mining property upon the terms and conditions in said lease expressed during the term thereby created and to and until the twenty-seventh day of November, 1883.

2. That by said lease it was stipulated and agreed that said term should commence from the twenty-seventh day of November,
57 1882, on the expiration of a certain lease of the Vishnu and Idaho mines theretofore executed by plaintiffs to said Thomas Kitto and others, or in the event of an assignment of said last-named lease to the defendants before said twenty-seventh day of November, 1882, then that said term should commence from the date of such assignment and should continue until said twenty-seventh day of November, 1883.

3. That in and by said lease said defendants, among other things, covenanted and agreed to enter upon said property and to mine and extract ore from the same so long as they should find it profitable during said term, and they were thereby authorized and licensed to hold said property and to mine and extract ore therefrom so long as they should deem fit during said term, and it was thereby stip-

ulated that said defendants should have the right at any time to stop work on said property when they should find or deem the same unprofitable.

4. That in and by said lease a rent or royalty of one-half of the gross proceeds of said property was reserved to plaintiffs,
58 which defendants covenanted and agreed to pay to plaintiffs as fast as taken out, and said defendants therein covenanted and agreed that in working the ores taken from said property they would, at each clean-up, furnish a true account of all ore extracted and milled and all bullion received and pay to plaintiffs one-half the proceeds thereof.

5. That said defendants entered into and took possession of said property under said lease, Exhibit "A," as tenants of plaintiffs before said twenty-seventh day of November, 1882 (they having secured an assignment of the residue of said term of said Kitto and others), as provided in said Exhibit "A," and worked said premises and took and extracted a large amount of gold-bearing rock and ore therefrom, and paid plaintiffs the sum of twenty-one thousand and twenty-four dollars as rent or royalty for said premises under and according to the terms of said lease, Exhibit A; but defendants have failed to pay over or account to plaintiffs for one-half of all the ores taken by defendants from said premises or one-half of all the
59 bullion received by them therefrom; and all the said moneys so received by plaintiffs were received as rent or royalty under and according to the terms of said lease, and were proceeds of ores mined and extracted from said premises prior to the twenty-eighth day of December, 1883.

6. That in and by said lease, Exhibit A, it was further stipulated and agreed that the defendants should have an option to purchase said Vishnu mine and the other premises described in said lease at any time during said term or on or before said twenty-seventh day of November, 1883, for the sum of forty thousand dollars, either out of the proceeds of said mine or otherwise; and plaintiffs covenanted and agreed to make conveyance of said premises to defendants upon such payment, provided that said sum of forty thousand dollars should have been paid on or before the said twenty-seventh day of November, 1883; and it was further stipulated and agreed in and by said lease that in case of such purchase by defendants the rent or royalty received by plaintiffs under said lease should
60 be applied upon or deducted from said purchase-money.

7. That time was by the terms of said contract and by the understanding and agreement of the respective parties thereto at the time of its execution of the essence of the option to purchase.

8. That in and by said lease the defendants covenanted and agreed, among other things, upon the expiration of the term thereby granted to surrender up the possession of said premises, with all the improvements, to plaintiffs, unless on or before the said twenty-seventh day of November, 1883, the said sum of forty thousand dollars should have been paid.

9. That on the twenty-fourth day of November, 1883, the plaintiffs, at the request of the defendants, extended the term and time of said

lease for thirty days or until and including the twenty-seventh day of December, 1883, and no longer, by the instrument marked Exhibit C attached to said complaint, and no other or further
61 extension of said term or of said option was ever given, promised, or assented to by the plaintiffs or either of them.

10. That according to the terms of said lease and said extension said term and said option to purchase expired with said twenty-seventh day of December, 1883.

11. That the defendants neglected, failed, and refused to make said purchase as provided in said option, and neglected, failed, and refused to pay plaintiffs said sum of forty thousand dollars on or before said twenty-seventh day of December, 1883, either out of the proceeds of said mines or otherwise, and failed to pay plaintiffs any sum of money whatever, except the said sum of twenty-one thousand and twenty-four dollars, less than one-half of the gross proceeds of said mines paid as rent or royalty as aforesaid.

12. That notwithstanding such failure the defendants neglected, failed, and refused to surrender up the possession of said Vishnu mine or the or any of the premises and improvements at the
62 expiration of the term granted by said lease as extended by said Exhibit "C," and continued to so neglect, fail, and refuse from and after said twenty-seventh day of December, 1883, to and until the commencement of this action, and during said time the defendants continued to work said Vishnu mine and to extract and remove therefrom large quantities of rich and valuable gold-bearing ores and threaten to continue so to do.

13. That during said thirty days' extension of time provided for in and by said Exhibit C the defendants extracted and removed from said Vishnu mine large quantities of gold and silver bearing rock or ore of great value, for a part of which defendants have neglected, failed, and refused to account with plaintiffs, either by payment of one-half the proceeds or otherwise.

15. That plaintiffs did not acquiesce or consent to defendants working or mining in or upon said premises after said twenty-seventh day of December, 1883.

16. That the plaintiff Reeser did not and has not milled
63 any gold-bearing or other rock or ore extracted by the defendants from the premises or from said Idaho mining claim during the month of January, 1884, or delivered any bullion therefrom to the defendants.

17. That defendants were not ready or able to pay and did not offer to pay said purchase-money of forty thousand dollars, less said rent or royalty paid as aforesaid, on or prior to said twenty-seventh day of December, 1883, or at any time prior to the month of June, 1884, and their inability so to do did not arise from any act or default of the plaintiffs or either of them.

18. That subsequently to said twenty-seventh day of December, 1883, and prior to the commencement of this action, and on the twenty-second day of January, 1884, the plaintiffs demanded possession of said premises from the defendants, but they then and from thence hitherto have neglected, failed, and refused to yield or

surrender such possession to plaintiffs, and have hitherto neglected, refused, and failed.

19. That the defendants expended on said premises described in said lease less than one-half of the proceeds of the ores taken therefrom.

64 *Second.—Conclusions of Law.*

1st. That said Exhibit A, a copy of which is attached to the plaintiffs' complaint in this action, is a lease with an option to purchase the demised premises.

2. That the defendants entered and took possession of the demised premises as tenants of plaintiffs under and by virtue of said lease, and still maintain the same, and have hitherto neglected, failed, and refused to surrender such possession, and they are estopped to dispute or question the title of plaintiffs to the demised premises.

3. That the reservation to plaintiffs in and by said lease of one-half of the gross proceeds of the demised properties was a reservation of a rent or royalty for the occupation and working of said properties, and the fact that the amount of said rent paid was to be deducted from or credited upon the purchase price of forty thousand dollars in case of the purchase of said properties does not affect its character as rent.

4. That time was and was by the parties thereto under-
65 stood and intended to be of the essence of said option to purchase, and the same expired under said lease and the agreement, Exhibit C, with the twenty-seventh day of December, 1883.

5. That defendants could only exercise their option to purchase said properties by the payment of the sum of forty thousand dollars, less the amount of royalty paid on or before said twenty-seventh day of December, 1883, and by their failure so to do lost all their rights under said option, and said option terminated, and defendants were bound by the covenants of said lease to surrender up the possession of said premises, with all the improvements, to the plaintiffs.

6. That defendants are not entitled to a decree for the specific execution or performance of said option to purchase either in whole or in part, and are not entitled to any order or injunction against plaintiffs in the premises, and are not entitled to any relief upon the case made in their amended cross-complaint in this action.

7. That plaintiffs are entitled to a decree perpetually en-
66 joining the defendants from entering upon or interfering with the possession of said Vishnu mining claim and from extracting from said mine or removing from said mine or the dump thereof any rock or ore.

8. That plaintiffs are entitled to a decree that defendants come to an accounting with them of and concerning any and all rock and ore taken from said Vishnu mine by defendants during said term and not heretofore accounted for, and that upon the amount being ascertained they pay a moiety thereof to plaintiffs.

April 18, 1885. CASE BRODERICK,
District Judge.

(Endorsed:) District court, Alturas county. Geo. F. Settle *et al.* ag'st John B. Winters *et al.* Findings of fact and conclusions of law. Filed May 6th, 1885. A. L. Richardson, clerk.

67 In the District Court of Second Judicial District of Idaho Territory in and for Alturas County.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs, *ag'st* JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants. } Judgment.

This cause came on regularly for trial under and in pursuance of the written stipulation of the respective parties on file in this action, Messrs. Huston & Gray and Richard Z. Johnson appearing as counsel for the plaintiffs and J. G. Sutherland, Esqr., and M. Kirkpatrick, Esqr., appearing as counsel for the defendants. Whereupon the plaintiffs and other witnesses in their behalf on the part of plaintiffs and the defendants and other witnesses on their behalf on the part of defendants were duly sworn and examined, and documentary evidence was introduced by the respective parties; and, the evidence being closed and the court having heard the argument of the respective counsel above named, the cause was by the respective
68 parties submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings of fact and conclusions of law in writing and orders that judgment be entered herein in favor of plaintiffs in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is considered, ordered, and adjudged and decreed that the defendants be perpetually enjoined from entering upon or interfering with the possession of said Vishnu mining claim mentioned in the complaint in this action, situated in Bear Creek mining district, Alturas county, Idaho Territory, known and described as the "Vishnu," being eight hundred feet in length by one hundred feet in width, in, upon, and along said lode or ledge, and from extracting from said mine or removing from said mine or the dump thereof any rock or ore.

It is further considered, ordered, adjudged, and decreed that said plaintiffs are entitled to an accounting with the defendants of and concerning any and all rock and ore taken from said Vishnu mine by defendants during said term and not heretofore accounted
69 for, and that it be referred to A. L. Richardson, Esq., the clerk of this court, to take and state such account.

And it is further considered, ordered, adjudged, and decreed that defendants take nothing by their cross-complaint in this action; that their amended cross-complaint in this action filed be, and the same is hereby, dismissed; that defendants are not entitled to any order restraining plaintiffs from the enjoyment of said premises prior to or pending any appeal that may be taken in this action, and that the said plaintiffs have and recover of and from the said de-

fendants the said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of — dollars.

April 18, 1885.

CASE BRODERICK,
District Judge.

70 (Endorsed:) District court, Alturas county. Geo. F. Settle *et al.* ag'st John B. Winters *et al.* Judgment. Filed May 6th, 1885. A. L. Richardson, clerk, by B. S. Prickett, deputy.

71 *Order Entering Judgment.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

Present: Hon. Case Broderick, presiding judge.

May Term, A. D. 1885.

THURSDAY, *May* 28, 1885.

GEO. F. SETTLE *et al.*
vs.
J. B. WINTERS *et al.*

On motion of J. W. Huston, Esq., of counsel for plaintiffs, ordered that judgment be entered herein in favor of plaintiffs and against defendants in accordance with the findings of the court heretofore filed in said cause.

72 In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants.

Notice of Intention to Move for a New Trial.

To R. Z. Johnson, Esq., and Huston & Gray, att'ys for plaintiffs; A. L. Richardson, clerk of said court:

Please take notice that it is the intention of said defendants to move said court in the above-entitled action for a new trial on the original and cross complaint on the following grounds, namely:

I.

Errors in law occurring at the trial and accepted to by defendants in the following particulars, viz:

1. The court erred in receiving in evidence and refusing defend-

ants' motion to strike out the certified copy of the lease
73 or agreement annexed to the complaint and the supplemental agreement, also annexed to complaint, and thereupon noticing that the plaintiffs held the affirmative side of the case and was entitled to open and close.

2. The court erred in excluding the evidence offered by defendants in the answer of Geo. F. Settle in an action heretofore brought against him in this court by Jacob Reeser, in which answer said Settle stated and admitted that one John Dawley owned five and V. S. Anderson thirty-two and $\frac{5}{8}$ feet in the Idaho mining claim.

3. The court erred in overruling the following question put by defendants to witness Winkelbach: "Was one-half of the proceeds paid as purchase-money or as rent?"

4. The court erred in overruling defendants' objection to questions put to witness, George F. Settle, and others calling for circumstances and conversations occurring prior to and at the time of the execution of the contract annexed to the complaint and then marked Exhibit "A" to control or effect the construction and effect of said contract.

74 5. The court erred in overruling defendants' objection to questions put to witness, George F. Settle, calling on him to state whether he assented to the contract annexed to the complaint and then marked Exhibit C, whether Anderson was authorized to execute it, and when the execution thereof was assented to and ratified.

6. The court erred in overruling defendants' objection to the following question by plaintiff-, put to witness, George F. Settle: "What, if any, direction had you given to Anderson to execute it, or what authority?"

7. The court erred in overruling defendants' objection to the following question put by plaintiffs to said witness, George F. Settle: "What knowledge did you have of the working after the 29th of December and before the commencement of this action?"

8. The court erred in overruling defendants' objection to the following question put by plaintiff to witness, George F. Settle: "What directions, if any, did you give Reeser in consequence of receiving such information?" And in overruling defendants' objec-
75 tion to the answer to said question and motion to strike out said answer.

9. The court erred in overruling defendants' offer in evidence of affidavit of George F. Settle, dated and sworn to on Sept. 29th, 1877, as to the mines in question being capable of paying working expenses or wages.

II.

Insufficiency of the evidence to justify the decision and findings of the court in the following particulars:

1. In finding, as stated in finding No. 1, that the instrument therein referred to as attached to the complaint and marked Exhibit A is a lease.

2. In finding, as stated in findings numbered 3, 4, 6, 8, 10, and 19, that the parties stipulated in a lease.

3. In finding, as stated in finding numbered 3, that defendants were by said Exhibit A licensed.

4. In finding, as stated in finding No. 4, that by said Exhibit A a rent or royalty was reserved to said plaintiffs which defendants covenanted to pay.

76 5. In finding, as stated in finding No. 5 & 11, that defendants entered into and took possession under a lease or as tenants of plaintiffs.

6. In finding, as stated in finding No. 5, that defendants paid plaintiffs rent or royalty.

7. In finding, as stated in finding No. 5, that the moneys received by plaintiffs from defendants were received as rent or royalty.

8. In finding, as stated in findings No. 6, 7, & 10, that by said Exhibit A it was stipulated that said defendants should have an option to purchase.

9. In finding, as stated in finding No. 6, that it was agreed that rent or royalty received by plaintiffs should be applied as purchase-money.

10. In finding, as stated in finding No. 7, that time was of the essence of the contract in said Exhibit A or of an option to purchase.

11. In finding, as stated in No. 9, that no extension of time on Exhibit A after December 27th, 1883, was given, promised,

77 or assented to by plaintiffs.

12. In finding, as stated in finding No. 9, that there had been an extension before said date of the term of a lease.

13. In finding, as stated in finding No. 10, that defendants' option to purchase expired on the 27th day of December, 1883.

14. In finding, as stated in findings No. 11 & 12, that defendants neglected, failed, and refused to make said purchase.

15. In finding, as stated in findings No. 11 & 12, that defendants were in default in respect to making payment of $40,000 or any part thereof as purchase price.

16. In finding, as stated in finding No. 12, that possession for a term had been granted and extended.

17. In finding, as stated in finding No. 12, that defendants continued in possession after their rights had ceased or expired.

18. In finding, as stated in finding No. 13, that the Vishnu mine produced large or any quantities of high or any grade of gold or silver ores.

78 19. In finding, as stated in finding No. 14, that defendants have neglected, failed, or refused to account with plaintiffs for gold or silver ores extracted and removed from the Vishnu mine or bullion made therefrom.

20. In finding, as stated in finding No. 15, that plaintiffs did not acquiesce in nor consent to defendants' working or mining upon said premises after December 27th, 1883.

21. In finding, as stated in finding No. 16, that plaintiff Reeser did not mill any rock or ores extracted by defendants from the Idaho

mining claim in January, 1884, and did not deliver bullion therefrom to defendants.

22. In finding, as stated in finding No. 17, that defendants were not ready or able to pay the purchase price on ore prior to December 27th, 1883, or at any time before the month of June, 1884.

23. In finding, as stated in finding No. 18, that plaintiffs demanded possession on the 22nd day of January, 1884.

24. In finding, as stated in finding No. 19, that defendants
79 expended in said premises less than one-half of the proceeds of ores taken therefrom.

III.

That the decision and judgment are against law in the following particulars:

1. The findings of fact contain an erroneous rehash and construction of the written contract referred to as Exhibit A.

2. Each and every of the conclusions of law filed with the findings of fact and numbered one to eight, inclusive, and the judgment based thereon, are and each of them is contrary to law and erroneous.

3. The original complaint is insufficient. It does not state facts sufficient to constitute a cause of action, and facts necessary to a cause of action in favor of plaintiffs are not found.

4. All the issues made by the pleadings have not been disposed of by the findings.

5. Findings of fact do not warrant the judgment. Said motion will be made upon the minutes of the court and reference will be had to the pleadings, orders of the court, and stipulations of the parties on file, the deposition of Frank P. Cavanah, and the
80 phonographic report of the testimony on file.

SUTHERLAND & McBRIDE,
BENNETT, HARKNESS & KIRKPATRICK,
Att'ys for Def'ts.

May 23, 1885.

(Endorsed:) District court, 2nd judicial district, Alturas county, Idaho. Geo. F. Settle *et al. vs.* Jno. B. Winters *et al.* Filed May 28, 1885. A. L. Richardson, clerk. Copy of the within rec'd May 28, 1885. Huston & Gray, pl'ffs' att'ys. Sutherland & McBride, Bennett, Harkness & Kirkpatrick, def'ts' att'ys.

81 *Order Overruling Motion for New Trial.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

Present: Hon. Case Broderick, presiding judge.

May Term, A. D. 1885.

THURSDAY, *May 28th*, 1885.

GEO. F. SETTLE *et al.*
vs.
JOHN B. WINTERS *et al.*

Now, on this 28th day of May, 1885, came the plaintiffs, by Jo. W. Huston, Esq., of counsel, and the defendants, by M. Kirkpatrick, Esq., of counsel, and thereupon the defendants' motion for a new trial herein came regularly on to be heard, and after argument by said counsel the court, being fully advised in the premises, ordered that said motion for a new trial be, and the same is hereby, overruled. (To which ruling and decision overruling said motion the defendants, by their said counsel, then and there excepted in due form of law.)

82 In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, & JOHN WINKELBACH, Defendants.
} Statement on Appeal.

Pursuant to stipulation of the parties consenting thereto this action on the original and cross complaint was tried before Hon. Case Broderick, district judge, at his chambers, in Boise City, Ada county, Idado Territory. The trial was had without a jury and commenced January 29th, 1885, and was concluded and case submitted to and taken under advisement by said judge on the 7th day of March, 1885.

The following are the proceedings and testimony taken on said trial. R. J. Johnson and Huston & Gray appeared as counsel for said plaintiffs and M. Kirkpatrick and J. G. Sutherland as counsel for defendants:

The plaintiffs offered in evidence certified copies of the lease or agreement and sup-lement thereto, which are annexed to
83 the complaint and marked, respectively, Exhibit- A & B and Exhibit C, and on the same being read the plaintiffs rested.

Defendants, by their counsel, move the court to strike out said certified copies on the ground that they are annexed to the com-

plaint and their execution alleged in the complaint and expressly admitted in the defendants' answer and cross-complaint; that therefore their tenor and execution is not in issue; that, the plaintiffs' case calling for no proof on any matter in issue, the defendants have the opening, and will be entitled to a close. This motion being resisted by the plaintiffs, the court ruled and decided that plaintiffs were entitled to put said documents in evidence and to open and close; therefore that said motion be denied. Defendants then and there excepted to said ruling.

The defendants, to maintain and prove the issues on the original and cross complaint in said action, produced and examined witnesses as follows:

Testimony of Thos. Kitto.

THOMAS KITTO, being duly sworn, testified as follows:

(By M. KIRKPATRICK:)

Q. Where do you reside?
A. Rocky Bar, Alturas county, Idaho.
Q. How long have you lived there?
84 A. I came to Rocky Bar first in '76. I lived there and Atlanta ever since. I have been there since '80; up to that time I lived in Atlanta.
Q. And partly in Rocky Bar?
A. Yes, sir; back and forth.
Q. What is your age?
A. Forty-two.
Q. What is your occupation?
A. A miner.
Q. How long have you been engaged in mining?
A. Thirty years.
Q. Will you please state in what places and country?
A. I was first brought up in mining in England, and from there to Michigan, Colorado, Pennsylvania, New Jersey, Illinois, Ohio, Nevada, and Idaho.
Q. You are a practical miner?
A. Yes, sir.
Q. Has your experience been quite extensive?
A. Yes, sir.
Q. Do you know the parties to this controversy?
A. Yes, sir.
Q. How long have you known John B. Winters?
A. Since '82.
Q. At what place?
A. Rocky Bar.
Q. How long have you known Mr. Ganahl?
A. Same time.
Q. How long have you known Mr. Winkelbach?
A. Since '76.
85 Q. Where did you first know him?

A. Rocky Bar.
Q. How long have you known Mr. Reeser?
A. I have only been personally acquainted with Reeser since '80.
Q. At what place?
A. Rocky Bar. I had seen him before on several occasions, but was not acquainted with him.
Q. Before that time?
A. Yes, sir; I did not get acquainted with him until '80.
Q. How long have you known Mr. Settle?
A. I first saw him in '76, but did not get acquainted with him until '80.
Q. At what place?
A. Rocky Bar.
Q. Have you been well acquainted with Reeser and Settle since that time?
A. Yes, sir.
Q. Have they lived at Rocky Bar most of the time since that time?
A. Yes, sir; Mr. Settle has been away some.
Q. In what capacity, if any, have you been employed by defendants?
A. I have been employed as foreman of the mine.
Q. Mining foreman?
A. Yes, sir.
Q. For how long?
A. Since 1882.
86 Q. Upon what mines?
A. Idaho and Vishnu.
Q. As mining foreman what were your duties?
A. Having full charge of the men; looking after the mine and superintending the mine. I was foreman.
Q. When did you first commence as mining foreman for the defendants?
A. In 1882; I think it was the 22nd day of September, '82.
Q. Have you continued in their employment ever since?
A. Yes, sir.
Q. Prior to that time did you have any connection with the Vishnu and Idaho mines?
A. Yes, sir. I was one of the lessees.
Q. Do you mean yourself and others?
A. Yes; others and myself had a lease on the mine from Reeser.
Q. At what time did you take that lease?
A. We commenced the 27th of November, 1880.
Q. And continued as lessees until what time?
A. Until the 22nd of September, 1882.
Q. What was the term of your lease?
A. Two years.
Q. Extending, then, to the 27th of November, '82?
A. Yes, sir.
Q. Will you state what the condition of the mine was at the time you took your lease?

87 Mr. JOHNSON: We object as being immaterial and irrelevant.

THE COURT: He may answer.

WITNESS: We took the lease in '80. The mine was in a very bad condition as regards ore. There was none in sight. We had to do a good deal of dead work to find ore. We run a tunnel, but did not find much there; came back and made a new tunnel. Our lease compelled us to come back and sink a shaft. I think it was 50 feet from the level of the Montana tunnel. We enlarged the shaft and sunk below that 75 feet in order to find ore. There was no ore in the mine in sight at the time until we sunk this shaft down. We took out some little ore there. The water got bad and we went back to another part of the mine, where we started first.

Q. You worked the mine under that lease up to the 19th of September?

A. To the 22nd of September.

Q. There was still, then, a little over two months of your lease unexpired when you quit operations?

A. Yes, sir.

Q. Was there any conditions in your lease as to any sale that Reeser and Settle might make?

88 Mr. JOHNSON: Was your lease in writing?

WITNESS: Yes, sir.

Objected to as secondary evidence and immaterial. Plaintiffs' counsel also object to any evidence being given as to the contents of that lease on the ground that it is secondary evidence and incompetent and irrelevant.

Overruled and duly excepted to by plaintiffs' counsel.

WITNESS: The conditions were that if the property was sold that we was to get ten thousand dollars if the mine was sold during our lease.

Q. Was the property bonded or agreed to be sold by Reeser?

A. It was bonded.

Q. To whom?

A. Mr. Pfifer.

Mr. JOHNSON: How did you know those facts?

WITNESS: Because the mine could not be bonded until we agreed to it.

Mr. JOHNSON: Were those things all in writing?

A. Yes, sir.

(Plaintiffs' counsel offer the same objection to this part of the testimony—that it is secondary evidence and incompetent and irrelevant.

Objection overruled; to which plaintiffs, by counsel, duly excepted.)

Direct examination resumed:

89 Q. At what price?

A. Thirty or forty thousand dollars; would not be positive, but think it was forty thousand.

Q. Under your lease did you and your associates work continuously?

A. Yes, sir.

Q. Was any sale made under that Pfifer bond?

A. No, sir.

Q. With what force of men did you work?

A. As high as 12 and down to 3.

Q. What was the average?

A. About 6 men.

Q. Did you take out much ore?

A. We did not take out a great quantity. The first year we did not take out much, but in the second year we took out considerable more than we did the first year.

Q. Did you strike any body of ore the second year?

A. We struck a body in the first year, but did not work in it much until the second year.

Q. About what size body?

A. Averaged about 20 inches.

Q. Did you work that body much during your lease?

A. No, sir.

Q. Was it soon after exhausted?

90 A. Very quickly after the other parties took hold.

Q. After the defendants came in?

A. Yes, sir.

Q. What was the condition of it when they came in?

A. There was 15 or 20 inches when they came in; it looked pretty permanent at that time, but it soon cut out without a slide.

Q. Do you know the time when defendants made their contract that is in question in this action with Reeser and Settle?

A. Yes, sir.

Q. That was September 19th, '82?

A. Yes, sir.

Q. Was any arrangement made by Mr. Winters with you about your lease at that time?

A. Yes, sir.

Q. What was it?

A. We were to have $5,000 to give up possession of the mine.

Q. Did you sell your lease to the defendants?

A. Yes, sir.

Q. They paying you $5,000 for the unexpired time?

A. Yes, sir.

Q. What date was that?

A. On the 22nd day of September, 1882, when we started in for them first.

91 Q. That was the time when you assigned your lease to the def'ts?

A. Yes, sir.

Q. You then engaged as mining foreman for the defendants in the Idaho and Vishnu mines?

A. Yes, sir.

Q. Please go on and describe the mining operations from that time until the levy of the injunction in this case, which was on the 11th day of February, 1884.

A. We worked some time in this ore, as long as it lasted; the body that was in the mine when they bought it, we worked that out, which did not prove to be very extensive; only got about fifty tons. Then we had to prospect to find more ore; in order to do that we had to run a tunnel. We drifted a tunnel east and struck ore. We had a small seam to start on, which did not prove to be of any account until we got in considerable distance; it was then good ore. We drifted through that body and had stoped it out on the back and then had to hunt for another.

Q. How far did you drift on that body?

A. 75 feet in good ore.

Q. What quality of ore was it?

92 A. If it was milled by itself I think it would average $50 per ton. It was milled with other ore and did not pay quite as much—probably $35 or $40; I do not know the exact amount.

Q. About what width was the ore body?

A. Averaged about 20 inches wide.

Q. Did it pinch out entirely?

A. Yes, sir; it pinched out overhead and ahead of us, but did not pinch out going down, but left it in the bottom of the tunnel; then we had to drift farther east—east of the Montana tunnel; then we struck into another ore body.

Q. How far did you drift without ore?

A. Did not know the distance; it was a good distance; probably 75 feet; little over or under. The next ore body was not as good as the first one. It was lower grade but a larger ledge. It would probably average about 2 feet. We also worked that out above the tunnel.

Q. This average value was about how much?

A. About $35 per ton.

Q. What became of that body?

A. We worked out all we could reach from that level. We

93 could not get down below it, and had to hunt further ahead last.

Q. How far?

A. I think something over 100 feet, and then cross-cut about 200 feet, about 40 feet from the starting point. We struck into a ledge, but could not say as to the value. We just run through it and did not mill any ore that came out of it on account — some old work being done there before I came to the country.

Q. That was all the ore you found in that cross-cut?

A. Yes, sir.

Q. Could ore in this body that you run across have been taken out at that time with economy?

A. No, sir.

Q. Is that the reason you did not take out that ore?

A. Yes, sir.

Q. Why could it not?

A. Because we had to sink for it, and in order to sink we would have to hoist the water and dirt. Our tunnel run out nearly level with the ditch—I think 10 or 12 feet above the gulch—and would not pay us to mine that out at that depth.

Q. What was your next move?

A. We had to go west of the Montana tunnel. We run a drift there on the ledge.

94 Q. In what direction?

A. West; that was considerable distance from the tunnel where we started. The starting point was from that tunnel. We run on this ledge.

Q. Did you start on this ledge?

A. Yes, sir; we could not tell what the ledge was until we drifted into it. This ledge we had struck at the time I was interested in the lease.

Q. What do you mean by "drifting on the ledge?"

A. On the course of the ledge.

Q. Did you start from the Montana tunnel?

A. At a point that ran out from the Montana down 75 or may be 100 feet west of the tunnel.

Mr. JOHNSON: What is the general course of the Montana tunnel?

A. It is a little west of north.

Direct examination resumed by M. KIRKPATRICK:

Q. When you say that you started in and drifted on the ledge do you mean that you drifted on ore?

A. Yes, sir.

Q. What quality of ore?

A. Very low grade, probably 5 or 6 or 8 or 10 dollars to the ton; very low grade.

Q. You drifted on this?

A. Yes, sir; we struck into a body that was richer and got more gold.

95 Q. Got about what quality of ore?

A. About $30 ore, I guess.

Q. The ore gradually improved as you followed the vein?

A. Yes, sir.

Q. Did you stope it out?

A. Yes; considerable of that ore.

Q. At the point where the vein became richer what was its width?

A. About 15 or 16 inches.

Q. How long was this body?

A. I think 175 feet.

Q. I understand you to say that the average value was $30 or $40 a ton?

A. Yes; sometimes it would go over $40; then we would get some that would not go $30.

Q. What did you do next?

A. After that there came a very heavy snow-storm and we had to

slacken the force of hands. The bins were full, and we had to go and do some more dead work to find ore.

Q. About what time was this?

A. Somewhere along in December, 1883—fore part.

Q. In what part of the mine did you do this work?

A. We went down the shaft. We still worked further west, and went down the shaft some 30 or 40 feet, down to the level be-

96 low; about 35 or 40 feet below the level of Montana tunnel.

Q. Did you you go east?

A. Yes, sir; east.

Q. How far?

A. I think 60 or 65 feet.

Q. Did you next cross-cut?

A. Yes, sir; north from there.

Q. This, you say, was in the early part of December, 1883?

A. Yes, sir.

Q. Was there at the point you commenced any show of ore?

A. No, sir.

Q. You say that you reduced your working force in the mine?

A. Yes, sir.

Q. What had it been?

A. On an average, about 17 men.

Q. And you reduced the force to how many?

A. To five.

Q. Do you know when that reduction was made?

A. I think the reduction was made on the 5th of January, 1884.

Q. What did you find in this cross-cut?

A. We run this cross-cut about 3 or 4 feet and struck a small seam of ore not over 1½ or 2 inches. We still continued to cross-cut north.

97 Q. How far?

A. I think, 30 feet.

Q. Did you find anything else?

A. No, sir; nothing else.

Q. What did you do then?

A. Stoped that and come back and started to run a drift on this same ore that we had struck.

A. About what time was that?

A. Somewhere in January or February—latter part of January, 1884.

Q. Was it about the 20th of January?

A. I think it was over that; it might have been a day or two over—about 21st or 22nd of January; might be a little more.

Q. What was done?

A. We commenced running on this seam; run in 3 or 4 feet and it commenced widening out, got larger; struck a pretty good body of ore.

Q. About what time was this?

A. It must have been about the 5th or 6th of February.

Q. You do not mean February?

A. No; it was the latter part of January.

Q. What else did you do then?

A. We struck this body of ore and had to go up to the
98 level of the Montana tunnel and sink a winze down, in order to hoist the ore to this level and get it out so we could ship it to the mills.

Q. Did you mine any ore from that body?

A. We took some out the ledge, but did not take it out of the mine.

It is in the mine yet.

Q. About how much?

A. About 30 tons in the cross-cut that we run.

Q. That ore was in the mine when the injunction was served?

A. Yes, sir.

Q. And it is there yet?

A. Yes, sir.

Q. Did Reeser and Settle come into the mine at any time to see this last ore body?

A. Mr. Reeser did, along about the 21st or 22nd of January.

Q. Did he see the ore body?

A. I presume he did. I was not in with him.

Q. When did you quit work?

A. On the 11th of February.

Q. When the injunction was served?

A. Yes, sir.

Q. As the property looked at the time you sold your lease to Mr. Winters, what would you estimate its value at?

99 A. About thirty thousand dollars.

Q. At the time the injunction was served, on the 11th of February, '84, what would you estimate the value of the property at?

A. Seventy-five thousand dollars.

Q. What had caused this increased valuation?

A. The ore bodies which we had discovered in the mine.

Q. How many ore bodies?

A. Four.

Q. You had discovered four ore bodies?

A. Yes, sir.

Q. About how much ore had been taken out of the mine up to that time by the defendants?

A. I do not know.

Q. What is your estimate of it?

A. I am sure I could not tell. I did not keep any account of the ore that was taken away.

Q. At the time the injunction was served, about how much ore was there in sight in the mine still unextracted?

A. I should judge, 3,000 or 3,500 tons.

Q. In sight?

A. Yes, sir.

Q. What would be the aggregate value of the ore in sight at that time?

A. It would average $45 or $50; it might average over $50

100 on all the ore taken, all through. I should think it would average about $50 a ton.

Q. The net value of that ore, you think, would be $75,000?

A. Yes; I think it would.

Q. At the time you sold your lease to the defendants, which I understood to have been on the 22nd day of September, '82, what would have been a fair rental for the property in its then condition, as it looked?

A. One-twentieth would have been as much as I would want to pay if the lease was to have been continued. We would have to go and prospect and find more ore; there was not more than that to justify us.

Q. You agreed to pay one-third?

A. Yes, sir.

Q. Did you find that to be too much?

A. Yes, sir.

Q. Did you make any money upon that lease?

A. No, sir.

Q. Did you lose money?

A. We did not make miners' wages. We would not have made near that if we had not sold our lease; that gave us a little less than $4.00 per day, including the $5,000 for which we sold our lease to defendants.

101 Q. What were miners' wages?

A. Four dollars per day.

Q. Was that including the money that you got for your lease?

A. Yes, sir.

Q. On the entire proceeds of your work you did not make miners' wages?

A. No, sir.

Q. By paying one-third as rental?

A. No, sir.

Q. Did you have any conversation with Mr. Settle, before assigning your lease to the defendants, with reference to the sale of this mine?

A. Yes, sir.

Q. At Rocky Bar?

A. Yes, sir.

Q. About the time of the assignment?

A. Just before.

Q. Will you state what that was?

A. Mr. Settle said that there was a party that had offered to purchase the mine, and he wished to sell the mine; that he wanted to get out of the country; that Rocky Bar did not agree with his health; that he would like to go very much, and as our lease was pretty near out he thought if we could get four or five thou-

102 sand dollars for it, it was best to sell, as he wanted to get out.

Q. And you did sell?

A. We did; yes.

Q. Did you fix any price for your lease in this conversation with Mr. Settle for selling your interest?

A. Yes; we fixed our price at five thousand dollars.
Q. Did he indicate any price to you?
A. He said he thought it was better for us to take $5,000, as our lease had nearly expired.
Q. Did he indicate any other price to you?
A. No, sir.
Q. Do you know a mill over there known as Reeser's mill?
A. Yes, sir.
Q. Quartz-crushing mill?
A. Yes, sir.
Q. Is it at Rocky Bar?
A. Yes, sir.
Q. Is it situated near the mine?
A. About ¾ of a mile.
Q. Was there any ore crushed at that mill for the defendants?
A. Yes, sir.
Q. Was all the ore that was crushed crushed at that mill?
A. Yes, sir.
Q. Was there any ore crushed at the Reeser mill for the defendants in January, '84?
103 A. Yes, sir.
Q. About how much?
A. I do not know. I think it was 30 tons; am not positive.
Q. What year?
A. '84; in January.
Q. How long in January, '84, and during what part of the month was the mill engaged in crushing for the defendants?
A. I think it was about the latter part of the month.
Q. And about what length of time was it engaged in crushing?
A. 3 or 4 days; about 3 days, I should judge.
Q. That mill belongs to Mr. Reeser, does it?
A. Yes, sir.
Q. How much ore was taken out of the Vishnu and Idaho mines after the 27th of September, '83, by def'ts?
A. There is about 30 tons out of the mines and 30 tons loose in the mines; about 60 or 65 tons altogether.
Q. Was that taken out during January and up to the 11th of February?
A. Most of it was; yes, sir.
Q. This ore that was taken out in January, where is it?
A. In the bin in the ore-house and some of it in the mine?
Q. Remains there?
104 A. Yes, sir.
Q. Were any improvements made in the way of building by the defendants in December or January?
A. I think there was in the early part of December.
Q. What was it?
A. A building over the mouth of Montana tunnel.
Q. A large building?
A. Not very large—about 30 feet long, I guess, and 14 or 16 feet wide.

Q. What was the object of the building?

A. For framing timbers, doing carpenter work—for men to do their work in, and also to keep it from freezing in the tunnel.

Q. How long did it take to construct that building?

A. I think 5, 6, or 7 days or 7 or 8 days.

Q. After the timbers were on the ground?

A. Yes, sir.

Q. The force of men you worked—I understand you to say that up to the 5th of January the force of men averaged 17?

A. Yes, sir.

Q. That you worked continuously in the mine?

A. Yes, sir.

Q. On the 5th of January you reduced the force to four men?

105 A. Five with myself. Sometimes we had six—we had occasionally, running the car.

Q. Do you mean that there was 17 men from the beginning of the lease?

A. No; not all the time.

Q. During what time did you have these 17 men?

A. In May and June, I should judge; somewhere in the summer of '83.

Q. Up to the 5 of January?

A. Yes, sir.

Q. Then you reduced the force to four miners and yourself as foreman?

A. Yes, sir.

Q. Why was it reduced?

A. On account of snow. We could not get the ore to mill; could not get it hauled. Our bin was full and we did not have any place to put it.

Q. What wages was paid by defendants to miners?

A. Four dollars per day. My wages as foreman was five dollars.

Q. Was this the ordinary or established wages for miners?

A. Yes, sir.

Q. And, in fact, throughout Montana and Idaho?

A. Yes, sir; wherever I have worked.

Q. Were any supplies furnished by the defendants during

106 the month of January and up to the time you were enjoined, on the 11th of February, for the purpose of working the mines?

A. Yes, sir; there was.

Q. Do you know to what amount?

A. I do not.

Q. Have you made any estimate, Mr. Kitto, of the amount that was expended for miners' work during the month of January and up to the time that you was enjoined, in February?

A. Yes, sir; about $1,350, or a dollar or two over.

Q. This estimate embraces the time from the 27th of December, '83, up to the 11th of February, '84?

A. Yes, sir.

Not cross-examined.

Mr. JOHNSON: We move to strike out all the evidence of Mr. Kitto as irrelevant to this case. (Application to strike out is overruled; to which ruling the plaintiffs, by counsel, duly excepted.)

Testimony of John B. Winters.

JOHN B. WINTERS, being sworn on part of the defendants, testifies as follows:

By Judge SUTHERLAND:

Q. State whether you are one of the defendants in this action.

A. I am; yes, sir.

107 Q. What has been your business for some years past?

A. Mining.

Q. Do you understand mining practically? What experience have you had?

A. I have been mining for nearly 25 years on this coast.

Q. Where do you now live?

A. At Rocky Bar, Alturas county.

Q. How long have you lived there?

A. I went there two years ago permanently—the 1st of October, '82.

Q. Do you know the other parties to this action?

A. Yes, sir.

Q. When did you first become acquainted with property?

A. Through Mr. Reeser, I think, September or October, '82.

Q. Had you seen it at that time?

A. No, sir; I met him at Hailey.

Q. Had you seen the property prior to making the contract?

A. Yes, sir.

Q. Did you negotiate for that property in behalf of the defendants?

A. I had taken a part in it as far as Reeser is concerned, and Mr. Ganahl, on our part, as far as Capt. Settle is concerned.

Q. State what showing of ore there was in the mine at that time.

108 A. There was a stoping of ore that the lessees were working on that looked very promising at that time, above the Montana tunnel, I should think, 50 feet.

Q. Who do you refer to as lessees?

A. Kitto, Parkison and Davey.

Q. Was there any exposed ore?

A. There was quartz, but not what I would call ore; very low grade.

Q. Are you acquainted with the value of mining property at that time in Rocky Bar?

A. No, sir; I had no experience in property there beyond this.

Q. Do you know the value of mining from the indications—the apparent value?

A. Yes, sir.

Q. What, in your judgment, was the property worth at that time?

(Objected to.)

Q. Have you now a judgment of what the mining property was worth at Rocky Bar?

A. There was nothing outside of that I saw or examined.

Q. I am speaking now whether, *at* being an experienced miner, you had such experience as to enable you to estimate its value as it then appeared?

109 A. The property, as it then appeared, looked very promising, and taking its past history made the property worth probably $30,000 or $35,000.

Q. In view of the existence of the lease to Kitto at that time, had you had some conversation with these lessees with a view of ascertaining what you could buy them out for?

A. Yes, sir.

Q. Then executed this contract?

A. Yes, sir.

Q. How far had you gone?

A. No further than this: I got his price and, of course, we did not want that unless we got the other negotiations that were on hand.

Q. What was that price?

A. Five thousand dollars.

Q. From what you could see at that time in way of developments in this property—the ore disclosed—what, in your judgment, would have been, as you could see and estimate it then, a reasonable rent for the working of the mine—what proportion of the ore?

A. What was in sight, a very small amount; not over a fourth or fifth; not to exceed a 4th of the gross proceeds.

110 Q. Were you present when the contract was executed?

A. I was.

Q. Where was it executed?

A. At Rocky Bar.

Q. Both plaintiffs together?

A. Yes, sir.

Q. Both sign- it in one room?

A. Yes; in Mr. Reeser's room. He was confined to his room. I think it was in the same room; I am not clear on that.

Q. Did you understand from the plaintiffs how they were interested, in what proportion and in what property?

A. I heard that talk between —, and Mr. Reeser at Wood River told me that he was one-third owner in the Vishnu.

Q. Do you know how the money was divided between them?

A. Yes, sir.

Q. Did you have and conversation with Capt. Settle on the way to Reeser's room, when you went there for the execution of the contract?

A. I have no recollection of any.

Q. As to Reeser's title to this property?

A. I cannot recollect that I did, with Capt. Settle; I had with Reeser at Wood river.

111 Q. Did you have any conversation at that time with Capt. Settle as to what they owned?

A. Title to Idaho Hill is what Capt. Settle told me.

Q. When was that conversation?

A. About the time of this purchase.

Q. Was that all the knowledge you had about the title of the plaintiffs?

A. That was all at that time.

Q. After the execution of the contract in question state what you did with reference to buying the lease of Kitto and the other two gentlemen.

A. We made a purchase of that lease.

Q. And paid them how much?

A. Five thousand dollars.

Q. When did the defendants take possession under the contract?

A. I think it was about the 22nd or 23rd (I cannot recollect the exact time) of September.

Q. With what intention, made known to the plaintiffs, did the defendants take possession?

Mr. JOHNSON: We object to that as being immaterial and incompetent. We object to any evidence outside the contract.

The COURT: The contract ought to determine that matter, but there is no objection to stating how they took possession.

112 (Objection overruled; to which ruling the pl'ffs, by counsel, duly excepted.)

Question repeated.

A. We went there with the encouragement of these parties to purchase that property, as in conversation with Reeser, at Hailey, that he wanted to get away from there. The other by letter from——

Objected to as not responsive to the question, and reporter is requested to read the question.

A. We took possession as purchasers and negotiated as purchasers and made payments on the price as purchasers.

Q. How long did you defendants continue in possession?

A. Until the 11th of February, '84.

Q. That is, continued work until that time?

A. Yes; worked up to that time.

Q. When were the last returns made of proceeds for bullion shipped before that?

A. The last payment was made the 29th of December, but there was two returns of small lots after the 11th of February. The last return was settled on the 29th of December, '83.

Q. And payment was made to plaintiffs?

113 A. Yes, sir; on that date. What I understand by returns is when I got my returns from the mint.

Q. Including that payment, state whether up to that time you

had accounted and paid precisely one-half the gross proceeds of the mine.

A. I had.

Q. And no other returns for bullion sold was received afterwards prior to this action?

A. None whatever.

Q. Can you state approximately the amount in tons taken out of the mine during the period of your work?

A. Somewheres near 1,200 tons—close to 1,200 tons—a little under 1,200.

Q. State what show of ore there was at the time the suit was brought—the time the papers were served.

A. We had the mine open as it is now, showing a quantity of ore.

Q. Of what value, in your judgment?

A. My estimate made on it, I should put it somewheres between $80,000 and $100,000 on the ore in sight. I place it on the ore that we passed over in these drifts, which did not pass very high, and from former experience and in passing back. I estimate it

114 somewheres between $80,000 and $100,000.

Q. State whether the ore which is now in sight was disclosed by your works prior to this action and developed after the making of your contract.

A. No, sir; in running these we ran within a few inches of 600 feet on timbered and tracked drifts—all new ground-work.

Q. I asked whether the ore now appearing in the mine—whether it was known to exist prior to making the contract?

A. But at one point *was there* ore exposed and very low grade in the west work, which in following improved. Our east work was all new work.

Q. State whether there was, when this contract was made, any indication of the presence of this ore.

A. None that I saw.

Q. What proportion of the value, as you have estimated, the ore now disclosed has been entirely discovered by your work—the value?

A. I consider it all newly discovered. There was one point that showed quartz of five or six dollars value. I mean ore taken out at a profit.

Q. What is the value of that body and the value of the other bodies that you found?

115 A. The other bodies probably double or thrice this body.

Q. In the work that you did on the mine, what amount was expended by the defendants, in labor and otherwise, up to the time you was stopped working there?

A. Somewheres in the neighborhood of $35,000.

Q. Where did the plaintiffs reside at the time you was working the mines?

A. Reeser was at Rocky Bar the greater part of the time. Capt. Settle was away from the bar during the winter months, but spent his summers there.

Q. When there how near to the mine?

A. I should think within 150 feet from the mouth of the tunnel; possibly 200; don't know exactly.

Q. Did you have any conversation with him, in the spring or early summer of '83, in respect to the mine and your interest in it?

A. I did; it was after his return from Boise City, in the spring of '83. I cannot tell whether it was April or May. I think it was April, but am not positive. I met — on the street in front of the Alturas hill. He told me that he understood that mine looked pretty well. I told him that we were getting good ore, better than we had
116 had. He advised me to sell the mine. He says, You know it is better to sell a mine when it is looking well than when it is worked out, and if you cannot get as much as you think you ought to have we will make a deduction in the price in our contract. "One thing you may be sure of, I never want the mine back. no matter about the contract." I told him we was not ready to offer the mine for sale.

Q. Was anything said by him touching the question of more time?

A. That is the language he used, "that he never wanted the mine back."

Q. State where the ore was milled.

A. At Mr. Reeser's mill.

Q. Where is that mill situated with reference to the mine?

A. At the lower end of Rocky Bar, a distance from the mine of about a mile—a short mile.

Q. Was the gold extracted and turned into bullion at the mill?

A. Yes; turned into rough bars; no assaying done there.

Q. Who did that?

A. I generally assisted; Mr. Fitzwater generally done the melting, except two or three lots.

Q. In what condition was the gold when it came from the mill?

117 A. In amalgam. The amalgamating and cleaning up was done by Mr. Reeser. I assisted him at times and at other times furnished him with an assistant.

Q. What was done in work on the mine after the 27th of December, '83?

A. Continued mining.

Q. How many men?

A. 17 men. After our bins were full we reduced our force to four miners and a foreman—five men.

Q. What was the object of the reduction?

A. The bins were full and the heavy storms—the last team had gone.

Q. Was there such a body of snow that you could not get it out?

A. Yes, sir; there was not a man went over the road for nearly five months.

Q. From the fifth of January until the commencement of this action, how many men did you work?

A. Five, including the foreman.

Q. Where were the plaintiffs at that time?

A. Settle was at Wood River or Boise, away from Rocky Bar.

Q. Did you understand from Reeser whether he was in communication with the other plaintiffs on the subject of the mine?

A. Yes, sir; showed me several letters.

(Question repeated.)

118 A. I know that he was in correspondence with them.

Q. Where did you say Reeser was?

A. At Rocky Bar, up to the latter part of January.

Q. Where was he during the fall preceding?

A. I will correct that. He and I were at Hailey during the fall before for about two weeks, when I returned to Rocky Bar and he came to Boise City, and returned again to Rocky Bar a few weeks after.

Q. About what time?

A. He came here about the 25th or 26th of November, '83, to this place.

By M. KIRKPATRICK:

Q. Do you mean Mr. Reeser?

A. Yes, sir. He then returned to Rocky Bar a few weeks after—I should think two or three weeks after.

By Judge SUTHERLAND:

Q. After the 24th of November?

A. Yes, sir.

Q. Where was he from that time forward until you say he went away again?

A. At Rocky Bar.

Q. At what time did he go away again?

A. I have a memorandum among my letters. (Witness examines papers.) On the 24th of January he left for Boise City.

119 Q. From his return, after the 24th of November, until the 23rd or 24th of January he was constantly at Rocky Bar?

A. Yes, sir.

Q. State whether he and you was in friendly intercourse or otherwise.

A. My bed-room was his headquarters most of the time.

Q. Did he know about your continuance to work the mine?

A. Yes, sir. He told me to go ahead.

Q. Did you report to him about the reduction of the force?

A. Yes, sir. He said, "You are sensible in that; we are going to have a rough winter."

Q. Did you have any conversation with him after the 23rd of January about an extension of time to perform this contract? State whether he at any time told you the time was out.

(Objected to as leading.)

Q. State what Mr. Reeser said, if anything, in reference to your continuing to work the mine after the 27th of December.

(Witness refers to papers.)

Mr. JOHNSON: We object to the witness refreshing his memory from papers unless it is shown what the papers are and when
120 written.

WITNESS: If you want exact dates I will have to look at my memorandum; if you want it within a week or so I can tell without reference to it. On the 3rd of January Mr. Cavanah, who had been spending some time at the Bar with Reeser and myself, taking quite an interest in this matter, in assisting us in matters on the night before he left—on the 2nd of January I had a letter from Hailey, which I read to Cavanah.

(Objected to as irrelevant.)

Q. Have you the letter?
A. Not with me.
Q. Did you preserve it?
A. I did; I have it at Rocky Bar.
Q. Did you read it to Reeser?
A. Yes, sir.
Q. State what it was.
A. The letter was from Col. Wall to me.

(Objected to as irrelevant and incompetent.)

Mr. SUTHERLAND: I am asking the witness what he read to Mr. Reeser.

The COURT: He can state the conversation.

(Objection overruled; excepted.)

WITNESS: It contained a proposition from Col. Wall to endorse our paper for six months for the unpaid portion of our pur-
121 chase-money. When I read it to Reeser in the presence of Cavanah he said, "I will take that; I want to get out." Mr. Cavanah left with instructions to act for him with six months' extension.

(Objected to as not responsive to the question.)

Q. What did Reeser say in response to your reading that paper?
A. He said that he would accept the offer.
Q. What did he say to Cavanah with reference to acting in his behalf?
A. To act for him in the matter.
Q. State what he said.
A. The substance was that he was to act for him in closing that matter.
Q. What matter?
A. His interest that we were still owing him; the proposition of the balance due him on the property—one-third of the balance.
Q. In what way?
A. By taking Col. Wall's indorsement.
Q. At what time?
A. Six months.

Q. What was the occasion of Reeser delegating this authority to Cavanah?

A. As I understood it, that he wanted to get the matter closed up.

122 Q. Why did he not do it himself?

A. Cavanah was going through Hailey.

Q. With the expectation that it was to be done at Hailey?

A. Yes, sir.

Q. Did you go with Mr. Cavanah?

A. No, sir; I gave him a letter to Mr. Ganahl.

Q. Do you know Mr. Cavanah's handwriting?

A. I think I would. I have had some correspondence with him.

(Counsel here shows papers to witness.)

Q. State whether that instrument and signature is in his handwriting.

A. That certainly is his signature, and the other looks like the same handwriting.

(Counsel states that he will offer the papers in evidence later in the proceedings, and asks the court to observe or mark them at this time for the purpose of identification at the proper time.)

Q. Was this document ever in your hands?

A. No, sir; I cannot say that I have ever seen that until now.

Q. Let me inquire whether you ever received this in a letter from Cavanah and Mr. Ganahl joining him in a letter.

123 A. He sent me a copy, but I have no recollection of having that in my hands. The copy I have at Rocky Bar, which I presume is the same.

Q. Have you stated all the conversation you had with Reeser with reference to an extension of time and your continuance to keep the property? State what he said from time to time, if anything was said, after the 27th of December or recently before that time.

A. It was almost a daily conversation between us.

Q. Saying what?

A. He never intimated that he wanted the property back again.

Q. I ask what did he say?

A. Nothing definite about extension of time, only this conversation with Cavanah.

Q. How did he encourage you in proceeding in your working?

A. That we could have time to work out the balance out of the mine?

Q. Did he say that?

A. Continually—at all times.

Q. What did he state immediately before he went away, the 24th of January, with reference to influencing the coplaintiff for the same purpose?

A. A day or two before he started for Boise City he visited the mine. It had been rumored in town that there had been

124 a strike. He told me he was going to Boise City "to look

out for your and my interests and see that Settle don't make any move that will injure us."

Q. When was that?

A. The latter part of January, '84.

Q. You state that he left on the 24th?

A. Yes, sir.

Q. Was this the evening before?

A. Yes; evening before or two evenings before.

Q. Had he said anything to the same effect before? If so, state it.

A. It was a constant encouragement to me. We was boarding in the same house, and my room was his headquarters.

Q. State what was done at Reeser's mill in January with the ore from the mine.

A. There was a run made the beginning of January of some 60 tons—no, that was made in December; it was the latter part of December; then, again, the first of February, 84, there was 30 tons of ore in the mill that I instructed Mr. Martin to run for me the day before he left.

Q. What was done with the ore?

A. The bullion was shipped; it comes from the mill in amalgam.

125 Q. The amalgam was made at the mill; who turned it into bullion?

A. Mr. Martin, the man he left the mill in charge of.

Q. Was it shipped?

A. Yes; by Mr. Martin.

Q. In whose name?

A. In my name. That bar was shipped by mail—the express was not running then—by snow-shoe mail; the returns on that we did not get until April. That was ore of the latter part of January or first of February.

Q. State whether you caused any examination of the title of the property to be made.

A. I did not.

Q. Did the defendants?

A. Not that I know of until November, '83, nearly a year after the date of the contract.

Q. What was the result of the examination?

Mr. JOHNSON: We object; that cannot be proven by parol evidence.

The COURT: I suppose that will have to be settled by the records.

By Mr. JOHNSON: Did you examine the records yourself?

A. No, sir; Major Hyndman attended to it.

Mr. JOHNSON: We do not object to the witness saying whether
126 he was informed and what his information was.

By Judge SUTHERLAND:

Q. What did the attorney report to you as to said title?

A. He reported to me that there was a mortgage of seventy-odd hundred dollars.

Q. Upon what?

A. I cannot state that. He informed me that it was on the mining property.

Q. Did he not state to you upon what particular property the mortgage was?

A. I cannot recollect that he did, but that there was a mortgage on the property. That is the best of my recollection; 5 feet of the Idaho in the name of John Donnelly, I think it was, and that the other three claims in our contract, outside the Idaho and Vishnu, had no perfect title, and part no title at all.

Q. State whether the entire want of title was to all except the Vishnu and Idaho.

A. That was my understanding of it.

By Mr. JOHNSON: You say you got this from Maj. Hyndman?

A. I got an abstract from Major Hyndman.

127 By SUTHERLAND: State whether the plaintiffs have offered to deliver a conveyance to you?

A. No, sir.

Q. State whether, after the 27th of December, 1883, any objection was made by Mr. Settle to your proceeding with the work.

A. I did not see Capt. Settle again until the following April or May.

Q. Did you receive any information from him in any form?

A. No, sir.

Q. What was the total expense of the mine from the 27th of December, 1883, to the 11th of February, '84?

A. I have not got the items now; probably $2,000, in supplies and labor.

Q. State whether you were in readiness before putting in the answer and cross-complaint to pay the balance of the purchase-money, whatever it might be.

A. Yes, sir.

(Objected to a- leading.)

Q. State where the money was.

A. In McCormick's Bank, at Hailey.

Q. Before putting in the original pleadings of the defendants?

A. Yes, sir; and have been ever since, principal and interest.

Q. State what efforts were made to pay it to plaintiffs at that time.

128 A. I was only a witness to this extent: The party was introduced to Capt. Settle, and they turned the corner of the street together; that is all I saw. The introduction was done on the Bullion street corner.

Q. Who furnished the money?

A. Mr. Kirkpatrick.

Q. State whether you know it to be a fact or not that he had the money there for the purpose of making the payment.

A. I do know it. I was informed by Mr. Burkett.

Mr. JOHNSON: We object to the last part of the answer, as to what Burkett told him.

(Objection sustained.)

Q. State whether you made arrangements with Mr. Mackintosh to furnish money for that particular purpose.

A. I did. It way my agreement with him to keep that tender good whenever required.

Cross-examined by Mr. JOHNSON:

Q. Who introduced Mackintosh to Capt. Settle on that occasion?

A. I cannot recall who it was; there was quite a party of us. I think McQueen and Capt. Settle was at the lower corner of
129 the Bullion street block, and this party took Mackintosh over and introduced them.

Q. Did you go over?

A. I did not; he left with the intention of going to the bank to make the tender.

Q. How do you know?

A. That is where they started for. I saw him introduce Mackintosh.

Q. Was it McQueen that introduced them?

A. No; I think not now.

Q. Was it you?

A. No, sir.

Q. Was it Ganahl?

A. No, sir.

Q. Where were you at the time?

A. At Ganahl's office.

Q. That is all you know about the tender?

A. That is all.

Q. Is there any money subject to your order in McCormick's Bank now?

A. It is subject to my order on Mr. Mackintosh—my order on him when it is required.

Q. Do you think that money is on deposit now?

A. I do not know. It is where it can be reached if we need it.

Adjourned until to-morrow, Jan'y 28, '85, 11 a. m.

130 *Testimony of Geo. Kelley.*

GEORGE KELLEY, being duly sworn on behalf of defendants, testifies as follows:

(Examined by KIRKPATRICK:)

Q. What is your age?

A. About 42.

Q. Where do you live?

A. Rocky Bar.

Q. How long have you lived there?

A. Since '65, off and on, pretty much all the time.

Q. How long have you lived there continuously?
A. I have been there for the last ten years.
Q. What is your occupation?
A. I am sometimes engineer and sometimes miner.
Q. Engineer of a steam-engine?
A. Yes, sir.
Q. Have you had considerable experience in mining?
A. Yes, sir.
Q. Do you know the parties to this lawsuit?
A. I believe I do—all of them.
Q. How long have you known Mr. Winters?
A. Since '83—since latter part of '82.
Q. At Rocky Bar?
A. Yes, sir.

Q. How long have you known Mr. Winkelbach?
131 A. Personally since '65.
Q. Also at Rocky Bar?

A. Yes, sir.
Q. And Mr. Ganahl, how long have you known him?
A. By reputation, about the same length of time; never had any personal acquaintance with him until last summer.
Q. How long have you known Mr. Reeser?
A. I have known him personally 12 or 13 years.
Q. At what place?
A. At Rocky Bar.
Q. Has he lived there pretty constantly?
A. Yes, sir.
Q. Has he been there nearly all the time?
A. Yes, sir; made that his headquarters, I believe.
Q. How long have you known Mr. Settle?
A. About the same length of time; by sight and reputation, ever since '65; have been personally acquainted with him about 12 years.
Q. At Rocky Bar?
A. Yes, sir.
Q. Has he lived there during that time?
A. Yes, sir.
Q. Do you know the mining property called the Vishnu and Idaho mines?

A. Yes, sir.
132 Q. Did you ever work in those mines as miner?
A. Yes, sir.

Q. How long?
A. I worked there two different times; I think once 16 shifts and another 10 or 12; that was in '83.
Q. During what part of the year, can you remember?
A. I think the first time I went to work there was the latter part of May or the first of June, I am not sure which.
Q. And then you quit, and began work again at what time?
A. A short time afterwards; don't remember the day; not a great while afterwards; probably the same month.

Q. For whom did you work?
A. Gen. Winters.
Q. Do you know a mill there owned by Mr. Reeser, called the "Reeser mill?"
A. Yes, sir.
Q. Did you ever do any work in that mill?
A. I did.
Q. At what time?
A. I think it must have been about February or March of '83, the first time. I worked there on two different occasions.
Q. The first time, how long?
133 A. 17 or 18 days—am not sure which—in February or March, 1883.
Q. In what capacity?
A. Engineer; running the engine.
Q. When did you do any more work in the mill?
A. The last work was in the fall of '83; I think the first part of November.
Q. How long did you work?
A. A couple of weeks.
Q. In what capacity?
A. In the amalgamator—helping Mr. Reeser. I was working nights and he was working day-times.
Q. While you was employed at the mill was Mr. Reeser also employed there working at the mill?
A. Yes, sir.
Q. In what capacity?
A. He was general amalgamator and general sup't of the mill; had charge of the works, any way.
Q. Have you been quite intimately acquainted with Reeser?
A. Yes, sir.
Q. Did you, while you were at work in the mill, on either occasion of which you have spoken, have any conversation with Mr. Reeser relative to this mining property or contract between Reeser and Settle and the defendants in this case?
134 A. I have had conversations with Reeser two or three times in relation to the contract or perfecting a sale.
Q. Will you please state what those conversations were?
(By Mr. JOHNSON:) When was this?
A. I think in November. The last time I worked in the mill.
(By Mr. KIRKPATRICK:) November, 1883?
A. Yes, sir.
Q. That was when you was amalgamating and he had charge of the amalgamator?
A. Yes, sir.
Q. At what place?
A. At the mill at Rocky Bar.
Q. Just what was said.
A. Mr. Reeser said that he had sold the Vishnu, and that he should wind up his business and go away, and he told me if I be-

haved myself that I would get his place; that when he went away that the other parties would take charge and I could get his place.

Q. Did he say that he, Settle, had sold the mine?

(Objected to.)

Q. Did he state anything more about the sale?

A. I asked him what the price was for the mine, and he told me that he got $40,000, and that one-half the proceeds of the ore
135 was held back as payment on the mine, and that he expected in a few days that the balance would be paid, and that he would leave.

Q. Did he state what had been paid?

A. No, sir; he said that he supposed that about half of it would be paid when he would leave, about the 27th of December.

Q. Was anything said about the mill?

A. All that was said that I remember well. I supposed at the time that the mill was sold. When I went to work in the mill I went to work for Mr. Winters. I made the remark there, Who I was working for, Reeser or Winters.

(JOHNSON:) We object to this.

Q. What did Reeser say to you?

A. He said that he was getting one dollar a ton for crushing, and that he was working for wages.

Q. For the use of the mill?

A. I presume so.

Q. Did he state why he was anxious to sell?

A. Yes, sir.

Q. What was it?

A. Because he could not get along with his partner, Mr. Settle, and wanted to get out of it.

Q. Did he state why he could not get along with Settle?

136 A. He said that he and Settle had been at loggerheads ever since he had been in the mine, and that Settle had tried to rob him out of the mine.

Q. Had you any other conversations with Mr. Reeser upon this subject at any time?

A. I might have. I suppose I might have spoken to him, but don't remember any other conversation about it.

Q. Have you been in the Idaho and Vishnu mines recen-ly?

A. Yes, sir.

Q. When?

A. The 17th of this month.

Q. With whom?

A. With Mr. Kitto and Mr. Wm. Hardwick.

Q. For what purpose?

A. To examine the mine.

Q. What did you find its condition to be?

A. Good.

Q. Did you find that the mine was caving?

A. No, sir.

Q. Did you go through the works?
A. I did.
Q. Make a careful examination?
A. Yes, sir.
Q. How was the mine as to timbering?
137 A. It was as sound as the day it was put in, as far as I could see.
Q. Were the timbers crushed in any way?
A. In the winze there was a couple of timbers had sprung, but was not out. They did not let any granite out.
Q. The mine was in good condition?
A. Yes, sir.

Cross-examined by Mr. JOHNSON:

Q. When did you say you went into the mine?
A. I think the 17th of this month.
Q. January?
A. Yes, sir.
Q. You state that in November, '83, Mr. Reeser told you so. Can you give us his language?
A. Yes, sir.
Q. Please give it to us.
A. He told me that he had sold the Vishnu.
Q. That would not be his language.
A. He said, I have sold the Vishnu, and I am going away, and if you behave yourself and attend to business you will get my place and will be old Jake Reeser after I am gone.
Q. Anything else?
A. I asked him how much he had sold for. He said, "$40,000."
Q. Anything else?
A. Yes. He said they held back one-half of the gross proceeds of the ore on payment for the mine.
138 Q. Who are they?
A. I presume Gen. Winters and his partners.
Q. Winters and partners held back one-half the gross proceeds to pay for the mine?
A. That is the way I understood it.
Q. Anything else in that conversation?
A. He said, We expect to be paid up in full about the 27th of November—somewheres along there—don't remember the exact date. He said, "Then I am going away." Did not tell me where he was going.
Q. Is that all he told you?
A. I believe that is all.

Testimony of T. W. Rollins.

TRUE W. ROLLINS, being duly sworn in behalf the defendants, testified as follows:

Q. Where do you reside?
A. Rocky Bar.

Q. How long have you lived there?
A. Since '77; spring of '77.
Q. What is your occupation?
A. Manager of the Elmore Gold Mining Co.
Q. Do you know the parties to this suit?
A. Yes, sir.
Q. How long have you known Mr. Reeser?
A. Since '77.
139 Q. At Rocky Bar?
A. Yes, sir.
Q. How long have you known Mr. Settle?
A. About the same time.
Q. How long have you known Mr. Winters?
A. Since '81.
Q. How long have you known Mr. Winkelbach?
A. Since '81.
Q. And Mr. Ganahl?
A. Since '81.
Q. Did you at any time go with Mr. Winters at Rocky Bar to call on Capt. Settle with reference to any contract between them?
A. Yes, sir; I believe I did.
Q. State fully what occurred.
A. I think it was about the evening of November 14th, 1883. I visited Capt. Settle at the request of Mr. Winters to testify to his conversation with regard to where he wanted the balance of the purchase-money paid, as I understood it.
Q. That the defendants had contract with the plaintiffs?
A. I suppose so. We met him on the stoop or porch of the house; it was a moonlight night. He asked him if he would go to Hailey the next morning. Settle said that he did not think he could. Winters asked him where he would like to have this money
140 paid. Settle said that he would like to have it paid at Rocky Bar. Winters said that he would try to get back by the 23rd or 24th of the month, and Capt. Settle said, "Well, Mr. Winters, if you are two or three days behind the 27th it will not make any material difference;" that he could not go to Hailey, but would write to Judge V. S. Anderson that evening to act in the matter.

Not cross-examined.

Testimony of L. Vineyard.

L. VINEYARD, being duly sworn in behalf of the defendants, testifies as follows:

(By M. KIRKPATRICK:)

Q. Where do you reside?
A. Hailey.
Q. What is your occupation?
A. Attorney-at-law.
Q. Do you know all the parties to this suit?
A. Yes, sir.

Q. How long have you known Capt. Settle?

A. I have known him, I believe, for the last—I got acquainted with him this winter two years ago—the winter of '82 & '3, two years ago.

Q. Have you at any time had a conversation with Capt.
141 Settle with reference to the contract for the mining property in question in this case? If so, state when, where, and what the conversation was.

A. I never had any conversation with Settle about the contract itself. I had several conversations with Capt. Settle two years ago, about this time.

Q. At what place?

A. At the Western Hotel, Boise City. The subject of that conversation was about like this: He had hoped they would make some money out of the mine, referring to the defendants, and believed that they would; said that he was sick and out of health; that he did not desire to mine any more; could not attend to the mining property in question, and spoke of the price of the property as $40,000; said that should they pay $15,000 or $20,000 it would indicate that they would be able to pay for the mine. Even if they did not pay the full price by the 27th, that they could have time on the balance.

Q. About what time was that?

A. That was about two years ago. There was no difficulty at all between the parties at that time. Everything seemed to be serene, everything amicable.

142 Q. Did you inform any of the defendants of what Capt. Settle had said to you?

A. I informed Mr. Ganahl some two or three months afterwards.

Not cross-examined.

Testimony of D. E. Waldron.

D. E. WALDRON, being duly sworn in behalf of the defendants, testifies as follows:

By M. KIRKPATRICK:

Q. Where do you reside?

A. Hailey.

Q. Do you know the parties to this litigation?

A. I think I know all the plaintiffs and defendants.

Q. How long have you known the parties, respectively?

A. I first met Mr. Reeser a year ago last September, at Rocky Bar. I did not see Mr. Settle at that time. I was there two or three days. I have known Mr. Settle since a year ago last December; this last December met him at Hailey.

Q. Did you have any conversation with Settle at any time with reference to the contract between himself and defendants and the property in question?

A. Some time in December a year ago, in '83, at Hailey, we had quite a talk; got acquainted there; don't remember who in-

troduced me to Settle. We had quite a talk, about the Merchants' Hotel or two or three doors above, about general matters. He spoke about the Vishnu mine and these parties with reference to the sale. There was very little said about that, except to the effect that they had made a sale and would be very glad to see it consummated—carried out; and spoke about being willing to give reasonable time; seemed to want the sale to go on; that was the burden of the talk. I did not charge my mind with the phraseology.

Q. Have you had any conversation with Mr. Reeser in reference to the subject at any time? If so, please state what it was.

A. Prior to December—I think some time in November, '83, at Hailey. Mr. Reeser and I got well acquainted over at Rocky Bar, and I met him quite often, and we would go and have a walk and have talks, and he said that he was anxious. This was prior to this conversation with Capt. Settle that he——

Q. You fix this conversation in November, 1883?

A. Yes, sir. Mr. Vernam was there, and Mr. Reeser said that he wanted to make a trip back to Pennsylvania. He appeared to be friendly, and several times expressed himself that he hoped
144 that the parties could get the money from Vernam. We had several walks and talks about it; the matter of the sale would come up; he was there on that business.

Q. Was anything said in these conversations as to the time of payment?

A. He would express himself as hoping, for the benefit of these parties, that Vernam or some one else would come to time; that, as far as he was concerned, if there was a fair prospect of the balance being paid that he was willing to give any reasonable time. He seemed to be anxious to have the thing closed up.

Q. You say that previous to this time you had been at Rocky Bar?

A. Yes, in September, year ago; was there two or three days—between there and Atlanta; spent most of the time at Rocky Bar?

Q. That was in September, '83?

A. Yes, sir.

Q. Was Reeser there at that time?

A. Yes, sir.

Q. Did you observe the relations between him and Gen. Winters at that time?

A. Yes, sir; they seemed to be very cordial, judging from appearances.

Q. What appearances?

A. I roomed in the room adjoining the one where Gen.
145 Winters slept and was with him a good deal of the time, and went down to the mill several times, and Mr. Reeser was very kind and agreeable; showed me over the mill and the operations of the mill, and had a great many conversations.

Q. I was asking you about the relations between Reeser and Winters?

A. I was around the hotel a good deal, and Mr. Reeser would

come up there two or three times a day and go into Gen. Winters' sitting room and have talks; appeared to be very agreeable relations between one another.

Not cross-examined.

Testimony of Richard Tregaskis.

RICHARD TREGASKIS, being duly sworn in behalf of the defendants, testifies as follows:

(By M. KIRKPATRICK:)

Q. Where do you live?
A. Mountain Home, Alturas county.
Q. What is your age?
A. 60, past.
Q. Do you know all the parties to this suit?
A. Yes, sir; I don't know as I know all the parties to the suit, but I know Mr. Reeser, Mr. Settle, Mr. Winters, Mr. Ganahl, and Mr. Winkelbach.
Q. How long have you known Mr. Reeser?
A. About 29 years; between 20 and 30 years; cannot say exactly how long.

146 Q. You have been quite intimately acquainted with him?
A. Yes, sir; always good friends.

Q. Have you —, at any time, a conversation with Mr. Reeser with reference to a contract between him and Gen. Winters and defendants in this case? If so, please state when, where, and what it was.
A. I have, and think it was between the 26th of November, '83, and the last of November. We have had several talks since, but that was the first talk.
Q. What was that conversation?
A. I was at Kuna, and Mr. Reeser came down there; and, being old friends, and having my buck-board there, we came over together; cannot say just what date, but I referred to the register at the hotel, and think it was the 26th of November. The conversation was to this effect: There was circumstances connected with it that brought out the conversation. I was at that time in difficulty, and Mr. Reeser told me that he had bonded the mine, and that he expected the money, and that if he got it that he would assist me. He said he had bonded the mine to Winters, and I think he said to Ganahl,

147 but that they did not come to time, and he thought they were pushed for money, and that he hoped that they would, as he was tired of the business and wanted to go into the cattle business, and that he had given 30 days' extension, and that he expected to get the money. That is all the conversation we had.

Not cross-examined.

Testimony of F. Ganahl.

FRANK GANAHL, being sworn in behalf of defendants, testifies as follows:

(By M. KIRKPATRICK):

Q. You are one of the defendants in this case?
A. I am, sir.
Q. I will ask you to look at this paper and say if you ever saw it before. It is the deposition of Frank Cavanah.
A. I have.
Q. Did you see Cavanah sign it?
A. I did.
Q. At what place and when?
A. At Hailey, on the 20th of January, '84.
Q. Did Mr. Cavanah deliver that to the defendants?
A. He did, sir.

Not cross-examined.

Def'ts, by their counsel, place the deposition of Frank Cavanah in evidence without objection, which is annexed hereto and made a part hereof.

Adjourned until Jan'y 29th, 11 a. m.

148 *Testimony of Richard Mackintosh.*

JAN'Y 29TH, '85.

RICHARD MACKINTOSH, being duly sworn in behalf of defendants, testifies as follows:

(By KIRKPATRICK:)

Q. Where do you reside?
A. Salt Lake City.
Q. Do you know the parties to this suit? Do you know the plaintiffs, Reeser and Settle?
A. I met Mr. Settle once, and I know Mr. Reeser by sight; have never spoken to him.
Q. Do you know the defendants in this case?
A. Winters, Winkelbach, and Ganahl—yes, sir.
Q. Where did you meet Capt. Settle?
A. In Hailey.
Q. At what time?
A. Some time last June, I think it was.
Q. June, '84?
A. Yes, sir; June or July. It was June.
Q. Did you have an interview with him?
A. Yes, sir.
Q. Just state fully the purpose of the interview that you had with him.

A. I came up from Salt Lake City under an agreement with Gen. Winters to purchase or rather to advance to him a certain amount of money.

Q. What sum of money?

A. Twenty thousand and between eight and nine hundred dollars, principal and interest, calculated by Mr. Winters.

149 Q. What was this money for?

A. It was for the payment of money due by him and other parties to the contract in payment for the Idaho and Vishnu mines.

Q. The mine mentioned in the contract?

A. Yes, sir.

Q. Between whom?

A. Between Settle & Reeser, Winters, Winkelbach & Ganahl.

Q. State what you did.

A. I arrived there on Sunday.

Q. About what time in the month?

A. I cannot tell you the date.

Q. Early part?

A. I think it was in the early portion on the month. I can tell by referring to the bank account.

Q. Can you remember with reference to the time of putting in the pleadings in this case on behalf of the defendants? Was it before or after?

A. It was prior to that, I think. It was before Judge Bennett and myself came up to Hailey.

(By Judge SUTHERLAND:)

Q. Were not the pleadings under preparation at the time?

A. Yes, sir.

(JOHNSON:) Judge Sutherland, did you prepare the original answer and cross-bill?

150 (SUTHERLAND:) I did.

WITNESS: I recollect it now. I arrived in Hailey on Sunday day and, after conferring with Judge Sutherland and Mr. Winters on the subject, they told me that the parties would probably not receive the money. Judge Sutherland then went down to see Huston and Johnson that afternoon, and I was with him on one occasion. However, on Monday morning Judge Sutherland was drawing up the papers in his room. On Monday I had an interview with Captain Settle; cannot tell the date of the month.

Q. State the interview.

A. Mr. Winkelbach and I were talking together, and he said to me, There is Capt. Settle. He says, "I will take you over and introduce you to him," and he did so. I said to Capt. Settle, "Will you walk around with me to McCormick's Bank, I have some business with you?" and he said, Yes. I started ahead of Winkelbach and Settle and walked around the corner to the bank and got in a few yards ahead of them. As soon as I got in the bank I told Mr. Burkett to hand me out $21,000, which I had there. He stepped into

151 the vault to get the money. In the meantime Settle and

Winkelbach came into the bank. Settle said to me, "What is your business?" I said, "I will tell you in a minute." In the meantime Mr. Burkett brought the money out, nine or ten thousand dollars in gold, the balance in legal tender. The money was put on the counter, right alongside of me. Settle repeated the question to me, "What is your business?" and I said, "I want to pay you a sum of money on account of Mr. Winters and others." He said, "If you have any business with me, I refer you to my attorneys." With that we walked out of the bank. That was all of my interview with him at that time.

Q. You say that you offered him a sum of money?

A. Yes, sir.

Q. Did you do anything further?

A. No, sir. Settle then stepped out of the bank and I stood there with Burkett. Afterwards, in the course of 10 or 15 minutes—I was standing outside the bank—when Settle came up the street, and just as he got before me, he turned around and said to me, "Who are you, anyway?" "Do you owe me any money?" I said, "No, I don't; but I wish to pay you some money;" and
152 tried to repeat what I had said before, but he turned and went down the street. I told Mr. Burkett then that I would like to have him go with me to Huston & Johnson's and he did. I went there and told them I had been referred to them by their client, Settle. I told them that I did not bring any money at that time, but brought Mr. Burkett with me, and told them that I was ready to pay the money. They asked me who it was, and I told them on behalf of Gen. Winters and others, according to the contract between these people. They said it was all right; that their client was not going to receive any money. We had a friendly business talk, and they said when they got the mine that they would be prepared to sell it. I said that I was under contract with Winters to furnish the money, and that I was there to fulfil the contract.

Q. That is a full statement of your action in the matter?

A. That is all, sir.

Q. I will ask you this question: Have you been prepared ever since and are you prepared now and willing to pay this money to the plaintiffs for the defendants if they had been willing to receive it?

A. I have been and am now.

153 Cross-examined by Mr. JOHNSON:

Q. How much money did you agree to pay?

A. I agreed to pay the amount due by Winters to Settle and Reeser on their contract. That called for twenty thousand and eight or nine hundred dollars. That was principal and interest. I brought $21,000 with me from Salt Lake. I transferred it from the bank there. The amount figured up between twenty thousand eight hundred or nine hundred dollars.

Q. That is the amount you agreed to pay?

A. Yes, sir; I had a contract with Winters in case he completed his title to the mine,

Q. When did you make that agreement?

A. I went to Rocky Bar to examine the mine and come back to Hailey. I then told Gen. Winters that I would accept the mine and go to Hailey and return with the money.

Q. When was that?

A. Prior to this tender.

Q. How long prior?

A. I think a week or ten days.

Q. In the month of June?

A. Yes, sir. I might be a little mixed about that. It was within a week or ten days from the time I made the tender to Settle.

154 Q. You are sure your conversation with Settle was before July? It was the same day you came down to our office?

A. Yes, sir.

Q. You are sure that was prior to July?

A. Well, yes; yes, I know it was prior to July. There is such a thing as my being mistaken. I might have furnished myself with the date.

Q. What part of June was it?

A. Somewheres from the 5th to the 15th of June. I did not make any special thought of the date. I can refer to my books and give you the exact date that I tendered the money.

Q. What did you do with the money afterwards?

A. As soon as I returned I cancelled the exchange with McCormick. I took an exchange on Hailey, and as soon as I returned to Salt Lake I cancelled it. That credit was good to me as long as I stayed there, but as soon as I left that cancelled it. The money was there subject to my check when I drew it.

Q. Who did you have this conversation with when you came down to our office—Major Huston or myself?

A. I think you did the most of the talking. I don't think Mr. Huston took any part in the conversation.

155 Q. What do you say I said to you?

A. I told you my errand there; stated my business; told you that I made him a tender of the money, and that he referred me to you; that I was there to perform the contract with Winters and others. You was very non-committal; you said yes; you said afterwards that you would be very happy to treat for the negotiations for these mines after the litigation has ended, and I said I would be glad, too.

Q. That is the substance of what I said?

A. Yes, sir.

Q. Did I say anything about our not having any authority to receive the money?

A. I did not go there to tender the money to you, but at the request of Mr. Settle.

Q. Did I say anything about not having any authority to speak of that subject?

A. I cannot say.

Q. I did not say much, did I?

A. No, sir. You gave me to understand that your client was not prepared and would not receive the money. I merely went there to tell you that I was prepared to tender the money. I thought perhaps you was authorized to enter into negotiations.

156 Q. Do you remember about my saying anything about not having any authority from Settle in the premises?

A. I do not, but you might have said it; but you gave me to understand that Settle would not receive any money; at the same time you might have said that you had no authority. I went to you at Settle's request. I simply went with Mr. Burkett to introduce me to you, simply to state what I was there for, and that was the reason that I did not bring any money there with me. I thought perhaps Settle preferred to have his business transacted through his attorneys.

Q. You went down for the purpose of ascertaining if Capt. Settle did desire us to act?

A. He simply referred me to you.

Q. That was what you went down for, was it not?

A. I went down at his request. You told me that you would not receive any money; that Settle was not ready to receive any money. We sat there and, I believe, smoked a cigar and talked in a friendly way, without any details being entered into at all.

Adjourned until January 30th, 1885, 11 a. m.

JANUARY 30TH, 1885.

157 Owing to the non-arrival of John Winkelbach, one of the defendants and a witness in the case, defendants' counsel asked that the case be continued until January 31st, 1885.

Case continued until Jan'y 31st, 11 a. m. Case again continued from day to day until March 2nd, 1885.

Plaintiffs, by their counsel, as- that the "stipulation" be filed as of the date of January 27th; no objection, and it was filed.

Testimony of J. B. Winters (Recalled).

JOHN B. WINTERS recalled:

Q. When you was on the stand before you was asked this question—I read from the report of your testimony then (page 36):

State whether the ore which is now in sight was disclosed by your works prior to this action and developed after the making of your contract.

Answer. No, sir. In running these we ran within a few inches of 600 feet on timbered and tracked drifts, all new ground-work.

Is that your answer?

A. It should be "Yes, sir." That was my answer. It was new ground-work.

Q. On page 37 of the report you was asked this question: What proportion of the value, as you have estimated the ore now

158 disclosed, has been entirely discovered by your work?

The answer was: I consider it all newly discovered. There was one point that showed quartz of five or six dollars value; I mean ore taken out at a profit.

What is the meaning of that?

A. Ore that would pay. Five-dollar ore would not pay. I mean ore that carries precious metals in quantity sufficient to justify milling and mining.

Q. Anything below that you don't account as ore?

A. I do not; no, sir.

Q. You was asked this question: What is the value of that body and the value of the other bodies that you discovered?

You answered: The other bodies probably double or threble this body.

Which body do you mean?

A. The former bodies. This body, the development was made in January a year ago, January, '84.

Q. Do you mean to say that the bodies discovered prior were double or threble the January body?

A. Yes, sir; I would estimate it so.

Q. When this suit was commenced, in Feb'y, '84, who was in possession of the mining property described in the contract?

159 A. We were—our party.

Q. In exclusive possession?

A. Yes, sir.

Q. With regard to the force of men that were worked by def'ts in the mine during all the time that they were in possession, was that force as large as could be economically and profitably worked?

A. Yes, sir; at all times.

Q. What was the defendants' expenditures in working the property before it paid expenses?

A. The first ore that we had milled that paid expenses was in March, '83; up to the time including the lease purchased between thirteen and fourteen thousand dollars.

Q. The first ore that paid expenses was in March, '83?

A. Yes, sir.

Q. How much time had the Kitto lease to run at the time you took the assignment of it?

A. I cannot recall the exact date of that instrument. I think not quite two months.

Q. You took out quite a quantity of ore, did you not, during the time, the unexpired time, of the Kitto lease?

A. Yes, sir.

Q. Did you pay over one-half of the proceeds during that time as well as after?

160 A. Yes, sir; we did.

Q. When were you last in the Idaho and Vishnu mines?

A. Along about the 10th of January, this year.

Q. For what purpose?

A. To see the condition of the mine and to see what the parties were working at that took possession.

Q. Did you make a careful examination of the mine and workings?

A. Yes, sir.

Q. With whom did you go, if any one?

A. Mr. Rawlins.

Q. Did he also examine it?

A. Yes, sir.

Q. How much of an examination did you make?

A. I went principally to see if our main tunnel running to the ore body was in the same condition and to satisfy ourselves as to what work had been done after they took possession?

Q. In what condition did you find the mine?

A. In good condition. There had been a cave near the mouth of the tunnel, nearly 400 feet from the ore bodies, owing to the wet weather of last spring, and the snow melting had broken the lagging. There were no timbers out of place.

161 Q. This was before the tunnel had been reached?

A. Yes, sir.

Q. Were the timbers in the mine crushed at any point?

A. No, sir.

Q. What was the condition of the mine as compared with its condition prior to the 2nd of December last, when the plaintiffs broke in?

A. In the old work I could not see any change. They had been removing ore from the mine, a portion of the ore that I had mined prior to '83.

Q. What efforts, if any, did the def'ts make at any time to raise money to pay for the property outside of the proceeds of ore?

A. I opened correspondence in the summer of '83 with Mr. Vernam. He was delayed in getting to Rocky Bar until, I think it was, August, when he first came with a party to examine the mine.

Q. Who was Mr. Vernam?

A. Manager of the Columbia Beaver Co. at Saw Tooth. We opened negotiations to raise money in '83. He then went East, and I heard from him that his parties were willing to take the property. He came to Rocky Bar before November, '83. He received some

162 letters while he was there that the money was ready. Mr. Reeser, Winkelbach, and myself then went to Wood River.

Q. Did Mr. Settle go?

A. No, sir.

Q. Did you ask him?

A. He declined to go.

Q. Why?

A. I was informed by parties that came to me that——

(JOHNSON:) Never mind telling what you were informed.

WITNESS: I called on him to see where he would receive his money. He said Rocky Bar. I told him that I hoped we would have it by the 27th. He said that it would not make any difference if it was a little late. I think that it was the tenth or eleventh of November that we left Rocky Bar and went to Hailey.

Q. For what purpose?

A. To close this matter. Mr. Vernam was corresponding with all the parties by telegraph. After keeping us there several days they declined to take the property.

Q. He declined to take it?

A. Yes, sir.

Q. Then there was an extension, I believe?

163 A. Yes; that was arranged the same time, Judge Anderson representing Settle in that extension.

Q. I will ask you this question: Prior to the commencement of this suit, in Feb'y, '84, was it your belief, derived from the conduct and declarations of the plaintiff-, that you would be allowed time by the plaintiffs to pay for the mine?

(Objected to as leading and incompetent.)

(Objection sustained; exception for def'ts.)

Q. I understood you to testify that four ore bodies were struck in the mine by the def'ts during the time they held possession, including the one that was struck on or about the first day of Jan'y, 1884. I wish you would state, as near as you can, when those other bodies were struck and developed.

A. It was in our work, October, '82, to March, '83.

Q. Which are those bodies?

A. The east ore bodies; the others were in the west part of the mine.

Q. You estimate that there was about three thousand tons of ore standing in the mine now?

A. Yes, sir.

Q. Is that ore contained in those bodies?

A. Yes, sir; I am making this estimate on the supposition that they extend to the other bodies.

164 Q. This quantity of ore between these four bodies?

A. Yes, sir.

Q. I understand you to say that the three ore bodies struck between October, '82, and March, '83, contained double or threble the amount, in your estimate, that the ore struck in '84 does?

A. Yes, sir.

Not cross-examined.

Defendants, by their counsel, now offer in evidence clause 17th of the answer in judgment-roll, filed August 26th, 1880, in case of Reeser *vs.* Settle *et al.* Said clause refers to the ownership of 5 feet of the "Idaho mine" by one John Dunlay, offered as an admission by Settle at that time, and that some 30-odd feet belonged to V. S. Anderson. The same reads as follows: That said defendant Settle is the owner and holder of 1,362⅛ feet, undivided, of said 1,400 feet of said Idaho quartz ledge or claim, and that V. S. Anderson, of Rocky Bar, I. T., is the owner and holder of 32⅝ feet, and that 5 feet stands of record in the name of John Dunlay, one of the locators; that said def'ts, Settle and V. S. Anderson, to their respective interests have acquired and deraigned title from said locators, and that

they and their grantors have been in the quiet and peaceable
165 possession of said Idaho claim or ledge for more than 5 years prior to the commencement of this action, to wit, since June 4, 1883.

To this pl'ffs object on the ground that it is not an admission on the part of Settle; that it is a judgment-roll in another action and irrelevant to this cause, and that it is dated long prior to this contract by other parties.

(JOHNSON:) If that is admitted in evidence the whole roll should be admitted.

(The COURT:) That part of the roll bearing on that point will be admitted for the present, subject to objection.

Def'ts, by counsel, now place in evidence certified copy of a deed from V. S. Anderson to John B. Winters, marked "Exhibit D."

Testimony of John Winkelbach.

JOHN WINKELBACH, being duly sworn, testifies as follows:

Q. Are you one of the def'ts in this cause?
A. Yes, sir.
Q. Where do you live?
A. I live at present at Atlanta.
Q. Prior to that time where did you reside?
A. At Rocky Bar.
Q. How long did you live at Rocky Bar?
A. Since '63; have been away for a short time.
Q. Do you know the parties to this action?
A. Yes, sir.
166 Q. How long have you known Mr. Settle?
A. Since '64.
Q. How long have you known Mr. Reeser?
A. About the same time. I think it was in '64.
Q. You knew them at Rocky Bar?
A. Yes, sir.
Q. Got acquainted with them there?
A. Yes, sir.
Q. How long have you known Mr. Winters?
A. Since the fore part of September, '82.
Q. How long have you known Mr. Ganahl?
A. I think the first time I saw him in Rocky Bar was in '65 or '66.
Q. Are you acquainted with the mining property described in the contract between the plaintiffs and defendants?
A. Yes, sir.
Q. How long have you known the Idaho and Vishnu mines?
A. The Idaho mine since '64. I did not know much about it until '64. The Vishnu I did not know in those days; there was no Vishnu mine then.
Q. It was located afterwards?
A. Yes. I could not tell exactly when.

Q. Have you been in those mining claims?
A. Yes, sir
Q. Often?
A. I have been in the mines off and on ever since they worked them.

167 Q. At the time this contract was made, which was in September, '82, what, from your knowledge of the property, would have been a fair rental for it?

Objected to on the ground that no predicate has been laid for the question.

Q. You have been in the mines and examined them?
A. Yes, sir.
Q. You know that the property had been under lease?
A. Yes, sir.
Q. It was under lease at the time to Kitto and his associates?
A. Yes, sir.
Q. Are you a practical miner?
A. Yes; for about ten years.
Q. Where?
A. California, and for over a year at the Bar; and I was mining at Idaho City.
Q. How long at Idaho City?
A. Only a few months. I was one year in Northern Idaho.
Q. Have you worked in and examined a good many mines?
A. I have seen them worked. I have worked in some of them.
(Mr. JOHNSON:) This is property at Idaho City; was that placer mines?
A. Yes; and quartz mines at Rocky Bar and other places.

(Mr. KIRKPATRICK:)

168 Q. I repeat the question. What, in your judgment, at the time the contract was made, in '82, would have been a fair proportion of the proceeds of the mine as rental?
A. The last two parties did not make expenses in giving one-third. I mean make wages and expenses. I would not have given over $\frac{1}{8}$.

Objected to as not responsive to the question.

WITNESS: $\frac{1}{8}$ would have been plenty.
Q. Did you know anything about the title to the property at the time the contract was made?
A. I did not; no more than I supposed Reeser & Settle were the full owners.

Plaintiffs' counsel objects to the last part of the answer as not responsive to the question.
Last part of the answer is stricken out.

WITNESS: I don't know.
Q. When did you first hear that there was a mortgage on the Vishnu mine?

(JOHNSON:) We object. Witness has not testified that he ever heard it. Objected to as leading.

Q. When did you ever find out that there was a mortgage on the Vishnu mine?

A. The first was last June—when I was in Hailey, June, '84.

169 Q. Did you have any conversation with Geo. F. Settle in March, '83, with reference to this contract and the time of payment named in it?

A. Yes, sir.

Q. Where?

A. Up here at the Warm Springs.

Q. In this county?

A. Yes, sir; five or six miles from here.

Q. State what that conversation was.

A. I came down with bullion——

Q. From Rocky Bar?

A. Yes, sir. The first crushing that we made I went up to Warm Springs to see him and asked him where he wanted his portion of the money left. Says he, "John, you can leave two hundred dollars at Falk's store."

(JOHNSON:) What money do you refer to?

(WITNESS:) The money from that bullion. He said for me to leave $200 at Falk's store, at Boise City. The balance you can take back with you to the Bar and leave it in your safe. If you want to use some of it, you can use it. He says, "I have no use for it now, anyhow."

Q. Did he say anything with reference to the time of payment?

A. He asked me how the mine was looking, and I told

170 him it looked very well. He said if the money was not all paid by that day that it did not make much difference, as long as he knew that he would get it.

Q. By what date?

A. By the 27th of November—next fall—'83.

Q. Did you have any other conversation with Captain Settle after that time upon the same subject?

A. I did; after he came back to the Bar from Boise City; some time in June, '83.

Q. At Rocky Bar?

A. Yes, sir.

Q. What was that conversation?

A. It was to the effect that if the money was not all paid that we could have more time.

Q. State the exact conversation.

A. If the money was not all paid by the 27th of November it would be all right, as long as he was secured for his pay.

HUSTON: That is what he said?

A. Yes, sir.

Q. Did you have any conversation at any time with Mr. Reeser with reference to the sale of the contract?

A. Yes, sir; a number of times.

Q. State at what time.

A. I could not tell exactly the days or number of times.

171 He said, "I am glad that I have sold out. If I had the mine back again I could not work it with Settle, anyway, and would not."

Q. In January, '84, did you have any conversation with Mr. Reeser with reference to the property in connection with Mr. Cavanah?

A. Yes, sir; he came over to my place, right across the street from his hotel, at Rocky Rar.

Q. What did he say?

A. He said that he did not care about getting the property back; all he wanted was to get his money, and that if he got it by next summer it was all right; that he wanted to go to Pennsylvania; it was all he cared for.

Q. Did he say anything about interest upon the money?

A. I told him, "We will pay you interest on the money—what is fair." He said, "I am satisfied; the General spoke to me about that."

Q. Was you with the parties that went to Wood River in connection with the negotiation with Vernam?

A. Yes, sir.

Q. Who went?

A. Gen'l Winters, Mr. Reeser, and myself.

Q. What took place there?

A. We went down with the expectation of getting money from Vernam.

172 Q. What took place?

A. When we got there the money was not there, and they telegraphed two or three times to New York. They promised us that the money would be there when we left the Bar. We telegraphed to the company, but failed to get the money.

Q. Did Mr. Reeser make any statement to you at that time about an extension of time?

A. Yes, sir; he said he would give us an extension of 30 days; all he wanted was to get his money any time, as long as he was secured for it.

Q. The defendants went on working the mine after they made the contract, did they?

A. Yes, sir.

Q. Did Mr. Reeser after the 27th of December, '83, make any demand upon you for the possession of the mine?

A. No, sir; he never did.

Q. Was Reeser at Rocky Bar during January?

A. Yes, sir.

Q. What was he doing?

A. He was not doing anything. He was working in the mill, crushing ore for us, when he came out; that was before January.

173 Q. How much did def'ts pay for the Kitto lease?

A. Five thousand dollars.

Q. Who advanced and paid that money?

A. Myself.

Q. Do you know whether any ore was taken out during the unexpired time of the Kitto lease after you bought it?

A. Yes, sir.

Q. What part of the proceeds of that ore was paid to the plaintiffs?

A. One-half. The same as on the purchase contract.

Q. Did one-half of the gross proceeds of the ore taken out during the time the defendants worked it pay the expenses of mining?

A. No, sir.

Q. How much did it lack?

A. I could not say how much, but it must have been fifteen or sixteen thousand dollars or over.

Q. Were you present at Hailey when Mr. Mackintosh made an attempt to tender the money due upon the contract to Mr. Settle?

A. Yes, sir.

Q. State what occurred.

174 A. Mr. Settle was standing in front of the probate judge's office, and Mr. Mackintosh went over to him and said, "Mr. Settle, I would like to have a little talk with you; let's go around the corner." They walked around towards the bank. As we got in the bank Mackintosh called to Burkett and told him that he wanted to pay this party some money. Mr. Settle said, "What do you want with me?" He said, "I want to pay you some money for these parties." Mr. Settle said, "You are a stranger to me," and turned to go out. Mr. Mackintosh said, "Hold on; I want to have some talk with you." Mr. Settle said, "I have no business with you; you are a stranger to me," and walked out. Before that Mr. Burkett came out of the vault with some money; I suppose the full amount; that is what Mr. Mackintosh told me——

(Counsel objects to what Mackintosh told him and what witness supposes, and it is ordered stricken out.)

Settle would not stay to see it counted. Whether there was enough or not, he would not accept it.

Q. Have you stated fully what you know about that?

A. I understood that Mr. Mackintosh went down to see Mr. Johnson.

Q. You did not go with him?

A. No, sir.

175 Q. What efforts, if any, did the defendants make to raise the money to pay the amount due on the contract outside of the proceeds of the ore?

A. We tried every way to raise it. In the first place, of Mr. Vernam, in '83; he promised us the day before we went to Hailey; said he had money at Hailey.

Q. Did you make any other efforts?

A. Yes, sir; Ganahl and Gen. Winters made other efforts to get it from others.

(JOHNSON:) How do you know that?

A. I know that they got letters from Col. Wall, so I understood.

(JOHNSON:) Tell what you know.

A. I saw a letter from Col. Wall promising to endorse for us.

(By KIRKPATRICK:)

Q. In what capacity did defendants enter upon the property under the contract and work it; whether as lessees or purchasers?

(Objected to as incompetent and irrelevant; overruled; exception for plaintiffs.)

A. As purchasers.

Q. Was one-half of the proceeds paid as purchase-money or rent?

(Objected to on the ground that that is a matter to be determined by the contract. Objection sustained.)

176 Q. Did Mr. Settle or Reeser object to the working or expenditures of defendants in January and February, '84, on the property?

A. Not to me; Settle was not there in January and February; Resser was there.

Q. Where was Settle?

A. In Boise City, I think.

Cross-examined.

Q. Did you work during the winter of '83 continuously?

A. Of '82 and '83? Yes, sir.

Q. How did it look then?

A. When I left, in March, it looked pretty well.

Q. Did your partners say anything about getting further time?

A. No, sir.

Q. Did you go to Settle to get further time?

A. No, sir.

Q. Did you have any conversation with your partners before March, '83, that you would not be able to complete your contract before November?

A. No, sir; not that I know of; no particular conversation.

Q. When Settle came there, in June, '83, how did the mine look then?

A. It looked pretty well.

Q. Had you had any conversation with your partners before that time about getting further time?

177 A. No, sir; we had tried to raise the money.

Q. Had you had any conversation at all that probably further time would be necessary—I mean when you had the conversation with Settle?

A. We did not talk about the extension of time, but that we might get it out and might not.

Q. The mine looked pretty well?

A. Yes; pretty well in June.

Q. What did you and Winters and Reeser go to Hailey for?

A. To get the money of Vernam, in November, '83.

Q. You went to get money of him to pay the balance due on the mine?

A. Yes, sir.

Q. How did you pay this five thousand dollars to Kitto on the prior lease?

A. I don't know how, but I paid him some in cash and one note.

Q. How much cash did you pay them?

A. Something like thirty-five hundred dollars; it was all cash except the note.

Q. I mean how much cash did you pay.

A. Some in cash and some store goods; I don't know exactly.

Q. Can you tell about how much was paid in money?

178 A. I could if I had known that you would have wanted to know that; I did not bring my books down; I think between three thousand and thirty-five hundred dollars in cash.

Q. How much in goods and other property besides the money?

A. All but about eleven hundred dollars of the $5,000. The balance was in cash and goods.

Q. When did you deliver the goods?

A. Shortly after we bought the lease.

Q. How much was the note?

A. About $1,100.

Q. Is that the amount?

A. Yes, sir.

Q. Who did you give that note to?

A. Thomas Kitto.

Q. Have you ever been paid back that money from the mine?

A. No, sir.

Q. How much money have you drawn out of the mine?

A. I could not say how much. I know how much I have paid into it.

Q. About how much money have you drawn out of the mine?

A. I could not answer that question.

Q. Have you drawn $20,000?

A. No, sir.

Q. Fifteen thousand dollars?

A. No, sir.

Q. Ten thousand?

179 A. I have not drawn out ten thousand.

Q. Have you drawn out eight or nine thousand?

A. The money that came out would probably be four or five thousand dollars.

Q. Don't it amount to over ten thousand dollars?

A. No, sir.

Q. Do you swear that it does not exeeed $5,000?

A. I would not swear positively.

Q. Can you swear that it don't exceed $6,000?

A. I don't think it does.

Q. Does it amount to $10,000?

A. No, sir; I don't think it would amount to $10,000.

Q. Do you know that it don't amount to over $9,000?

A. I don't think it does.

Q. Have you got an account with your partners charging them with what you have advanced and crediting them with what you have received?

A. Yes, sir.

Q. Can you not tell what the account is?

A. My partner kept the books. I cannot tell what it was.

Q. Did it amount to $8,000?

A. No, sir.

Q. Did it amount to $7,000?

180 A. Somewhere about five or six thousand; it might have amounted to a little more.

Q. Would you swear that it did not amount to over $7,000?

A. I would not.

Q. Would you swear that it did not amount to over $8,000?

A. I don't think I would; I would not swear to any figures.

Q. Will you swear that they don't amount to over $9,000, cash, drafts, or anything of that kind that was credited up?

A. If I took drafts of some workmen do you mean that to be counted in?

Q. No, sir; I mean drafts taken from Gen. Winters on bullion, cash, or its equivalent that you have received from that enterprise.

A. I can swear that it is not over $8,000.

Q. Can you swear that it is not over $7,000?

A. I would not swear much below $8,000.

Q. When you received drafts or pay orders from the men you did not credit them to this account?

A. No, sir.

Q. Then why did you ask me if I wanted you to include

181 that? Do you swear that you have not received at different times, in drafts, money, and bullion, from your partners the proceeds from that mine as against what you have expended in the mine?

A. Yes, sir.

Q. Can you swear that it is not over $7,000?

A. I don't think I have received $7,000.

Q. Is that account in with your merchandise account?

A. Yes, sir.

Q. Where are your books kept?

A. At Rocky Bar. They are in the saloon. I have not looked at them since last summer.

Q. Do you know how it stood last summer?

A. My partner keeps the books all the time. I was in the saloon.

Q. You read English writing?

A. Yes, sir.

Q. You can read and examine the books?

A. Yes; I know pretty near the amount.

Q. I will ask you now what you have received as against those credits?

(Objected to as immaterial and not within the scope of the examination-in-chief.)

Redirect examination:

Q. Did Kitto and Co. receive this $1,100 note of yourself as cash?
A. This note was not received by Kitto and Co. but by Kitto.
Q. Did he receive it as cash?
182 A. He received the note as payment and delivered the lease.

Defendants rest.

Testimony of G. F. Settle.

Evidence for plaintiff-.

GEORGE F. SETTLE, being duly sworn for plaintiffs, testifies as follows:

Q. You are one of the plaintiffs in this action?
A. Yes, sir.
Q. Do you know the mining premises called the Vishnu mine?
A. Yes, sir.
Q. How long have you known it?
A. About ten years.
Q. Where were you at the time of the execution of this lease attached to the complaint, dated Sept. 19th, 1882?
A. At Rocky Bar.
Q. Do you know the condition of the mine at that time?
A. Yes, sir.
Q. Who was working it?
A. Kitto & Co., former lessees.
Q. Were you then in the habit of visiting it?
A. I visited it quite often that summer—the summer of '82.
Q. How long have you been engaged in quartz mining at Rocky Bar and vicinity?
A. Since '63.
183 Q. What was the condition of the Vishnu mine, as to development, &c., at the time this lease was made?
A. Verry good.
Q. Where was this lease in evidence as Exhibit A executed?
A. At Rocky Bar.
Q. By whom was it drawn?
A. By Frank Ganahl. (Shows paper to witness.)
Q. Did you ever see this paper before?
A. Yes, sir.
Q. By whom was that drawn?
A. Frank Ganahl.
Q. At what time?
A. The day we signed the lease; a few minutes before.
Q. At the same place?
A. Yes, sir.
Q. How did it come to be drawn?

A. I was in doubt whether the mine could be run in debt by the essees or not.

Q. How did he come to draw that?

(Objected to as incompetent and immaterial.)

Plaintiffs, by their counsel, put in evidence Exhibit "B."

(Mr. JOHNSON:) We propose to ask the witness now under what circumstances the instruments were drawn.

(Objected to by defendants on the ground that it is incompetent and because the original complaint alleges the agreement
184 as written, and thus precludes the plaintiff from proving any — to modify or affect the construction or effect of the instrument.)

The court ruled to admit the evidence subject to the objection, proposing to decide absolutely at a later time. Exception by defendant. It is understood that all testimony of this nature is under this objection and exception.

Q. Who drew this Exhibit A, attached to the complaint?

A. Frank Ganahl.

Q. What were your relations with Ganahl? What had they been?

A. Very good.

Q. I mean business relations?

A. He had been my attorney on several occasions; was then.

Q. He is an attorney-at-law practicing in this district?

A. Yes, sir.

Q. It was drawn at Rocky Bar?

A. Yes, sir.

Q. Did you have any other attorney—if so, who—at that time?

A. No, sir; no other attorney. There was no other attorney at Rocky Bar.

Q. What was the description drawn from?

A. I think it was a deed that I had formerly placed in escrow at San Francisco.

185 (Shows papers to witness.)

Q. Is that the paper?

A. Yes, sir; that is it.

Q. What did you give this to Ganahl for?

A. So that he could get the description of the mines and property.

Q. Did you give him any other memoranda or description?

A. I brought down quite a number of bonds, but this was the most complete. It was drawn by Judge Anderson.

Q. This was given to Ganahl to draw the description from?

A. Yes, sir. (Paper above referred to is put in evidence by plaintiffs' counsel and marked Exhibit "E.")

(Objected to on the same grounds as above.)

Q. Did you have any conversation with Ganahl as to "Exhibit A" before executing it?

A. The lease? Yes, sir; he read the lease over to me after he had written it.

Q. Where was this?

A. In Newcomer's Hotel in a room upstairs—the parlor.

Q. State what transpired.

A. When he came to the 1,400 feet I told him that I did not own the 1,400 feet; that V. S. Anderson owned 32⅝ feet, and told him to change it to read, the above 1,400 feet, less 32⅝ feet, and he
186 said it makes no difference *that* if V. S. Anderson owned that amount of ground, how much he asked for it. I told him there was an arrangement between Anderson and myself that when I sold the property I would put in that 32⅝ and pay him $500 for it. He said we will satisfy Anderson for that amount of ground, and I took their word for it.

Q. Did he tell you anything else about the instrument, what kind of instrument it was? What did he tell you about the meaning or purport of that paper?

A. We had considerable talk about the lease.

Q. At that time?

A. Yes, sir.

Q. What was it?

A. I asked Ganahl if there was anything in that lease that would prevent me from taking possession of the property if they did not pay $40,000 on or before the 27th day of November. He assured me over and over again that there was not. He seemed to be mortified that I should ask him such a question. He said, My God, Settle, do you suppose I would come here to take advantage of you or draw up a paper to trap you and get you into trouble? He said if the Co. lessees refuse to give up possession of that property
187 I will go into court myself and make them do it, and it will not cost you a cent. He repeated it over and over again.

Q. Refuse to give it up when?

A. At the expiration of the lease, unless money was paid. I then asked him another question: I asked him if there was such a thing as the lessees running the property in debt. Said I, "You may go on and work the property, and when you get ready to give it up leave it in debt." They could get out the ore in six months. Said I, "Is there any such thing in law as a lessee running the mine in debt?" He said, No. He says: We are not owners of the mine; we are lessees, and working the mine under that lease, and consequently our employees cannot look to you or the mine for any indebtedness.

Q. Was that before the execution of Exhibit B?

A. Yes, sir; it was the same evening—not more than an hour or half hour.

Q. Where did you have the next conversation?

A. We then went into the Alturas Hotel, owned by Reeser.

Q. What room?

A. I don't remember. It was Reeser's room.

Q. Was Reeser there?

A. Yes, sir.

Q. In what condition was he?

A. He was in bed; was not very well.

Q. Who was there?

188 A. Sol. Newcomer, Winkelbach, Winters, Ganahl, Reeser, and myself.

Q. What did you do there?

A. We had a conversation. Ganahl said there was no such thing as a lessee running the mine in debt and the mine being held for the indebtedness; that they were not purchasers in the mine, but were lessees. This was the argument used to me.

Q. Was there anything said there about the expiration of the contract?

A. Yes, sir; he said that unless they paid for the property on or before November the 27th that they would give up possession, and offered to go into court himself and make them give up to it, and that he would see that they did give up to it.

Q. Was there anything about what the contract meant in that regard?

A. Nothing more than that it was a lease.

Q. About the time?

A. He said, I don't know how many times, that they would surrender possession of the property unless they paid for it within the year.

Q. Did he say anything about what the contract meant as to time—what the purported construction was?

A. The purport was that they only had time for one year.

Q. Did he tell you that?

189 A. Yes, sir.

Q. How often did he tell you that?

A. Six or eight times.

Q. Did he say anything about what they would be bound to do?

A. That they would be bound to give it up. He says, We have promised in the lease three or four times that unless we pay up that we will have to surrender it. We cannot hold it over a year, and we will not pretend to. There was no misunderstanding about it.

Q. At which of these interviews was this Exhibit "B" drawn?

A. That waiver was drawn up probably about ten minutes before the lease was signed.

Q. How did it come to be drawn?

A. I wanted something to show that I understood beyond a doubt that this was a lease with a privilege of purchase.

Q. What did you tell him about this paper and what did he tell you?

A. I told him that while I had confidence in him and his integrity that there was some question in my mind about that lease; that there might be something in it that I did not understand. Says I, "I have read the statute about lessees of mines running in debt and the mine being held, and it was not clear in my

190 mind and I want something to show that I am not in danger, because, if the mine is not paid for within the year, I will take possession of it." He then drew up the waiver.

Q. Waiver of what?

A. To show that they were lessees; that they were to work the mine as lessees and not as purchasers

Q. Did he say anything about the necessity of this Exhibit "B?"

A. He said that it was not necessary, because, as he explained the law to me, they could not hold the owners of the mine; could only hold the lessees.

Q. Their interests?

A. Yes, sir; I wanted that very plain. I wanted to know that persons working in the mine for the lessees could not come upon me or the mine if they are owing them anything. I wanted that explained, and that they could not hold me; and to satisfy me he says, "I will draw up this instrument, and if you desire it I will have every man that works for us sign the waiver to hold the lessees and not you.

Q. That is the way you came to take Exhibit "B?"

A. Yes, sir.

Q. You heard Gen. Winters' testimony as to his intention. What knowledge did you have that the defendants or any of them

191 entered into possession of that mine as purchasers?

A. Never had any. I had knowledge that they entered as lessees.

Q. What notice did they give you when they entered into possession of the mine to that effect?

A. Nothing at all.

Q. In receiving payments what notice did you have; what notice that they were paid as purchase-money?

A. Nothing.

Q. Did Winters ever make any such statement to you previous to this controversy?

A. No, sir; not at all. They understood how it was to be paid and for what purpose.

Q. In the transcript of testimony Gen. Winters testifies as follows:

Q. "Did you have any conversation with him?" referring to yourself.

A. "No, sir; Reeser was at Rocky Bar the greater part of the time; Settle was away from the Bar; spent only his summers there."

Q. "When there how near the mine?"

A. "I should think within 150 feet."

Q. "Did you have any conversation with him in early spring about the mines?"

A. "I did. It was after his return from Boise City, in '83; cannot state whether it was in April or May."

192 Q. Where was you in April or May?

A. Boise City.

Q. Where in June?

A. Boise City.

Q. Where in March, '83?

A. I was in Boise City.

Q. How long had you been in Boise City?

A. I think I came down here on Christmas Day, '82.
Q. And remained here constantly?
A. Yes, sir.
Q. You were here in April?
A. Yes, sir.
Q. May and June, '83—all the time?
A. Yes, sir.
Q. Did you meet Winters in Boise City?
A. No, sir.
Q. How do you know that you were in Boise City during that time?
A. I remember I spent the 4th of July here.
Q. Had you been away prior to the 4th?
A. No, sir.
Q. When did you leave Boise City?
A. I think on the 13th—morning of the 13th—of July, '83.
Q. Why do you think so?
A. I know that when I went to Rocky Bar that I commenced boarding, and I put down the time that I commenced, and in making settlement last fall I found that I commenced on the evening of the 14th.

193 Q. You went immediately there after leaving Boise City?
A. Yes, sir; it was two days' trip.

Q. You are positive you remained here until after the 4th of July?
A. Yes, sir; I remember being here on the fourth; I could not be mistaken.
Q. Winters swears that you told him, "If you cannot get as much as you think you ought to have we will make a deduction in the price stated in the contract. Did you tell him that in those months?
A. No, sir; I was in Boise City.
Q. Have you ever told him that?
A. Not to my remembrance.
Q. Did you offer to take less than your price?
A. Yes, sir.
Q. Do you recollect meeting Mr. Vineyard here in January, '83?
A. Yes, sir.
Q. You was stopping at the Western Hotel?
A. Yes, sir.
Q. He visited you there?
A. He was stopping at the Overland. Yes; he visited me.

(Counsel reads from transcript of Vineyard's testimony.)

Q. How long was that after you took the lease?
A. I do not remember the month. I think it was some time in January that he visited me at the Western Hotel and
194 talked some about the mine.

Q. What intention did you have at that time as to whether they would be able to pay for the mine out of the proceeds during the lease?
A. I had none at that time. It was not paying them very well.

Q. That was in the winter?

A. That was in January or February—probably January.

Q. Did you have any conversation with Vineyard about paying for the mine?

A. I think that I told him that they ought to be able to pay for it. if they worked it properly.

Q. What did you tell him about giving them more time?

A. I never told anybody that. I never had any intention of it. They were aware of that before the contract was signed. I told them in the room that they must pay for it within the time.

Q. What, if anything, did you inform these defendants about giving them further time?

A. When the lease was drawn Mr. Winkelbach, Ganahl, Winters, and myself were talking about the time, and I told them that my opinion was that they could pay for the mine out of the roy-
195 alty within the year if they would work where I wanted them to. I wanted them to work at the bottom of our shaft, which is 75 feet under water. I advised them to get a pump, and we had plenty of wood on the dump to run the engine all winter. I told them that if they would commence there and work the mine sy-tem-etically that they could easily pay for the mine by the first of September, '83. Mr. Winkelbach said, "I don't know whether we have time enough." I said, You have plenty of time, and I desire that you pay for the mine within the year, because I want to leave the Territory.

Q. What promise, if any, did you make to extend the time?

A. None to anybody. They all knew that, and knew it when the contract was signed.

Q. Where was this Exhibit "C" executed?

A. At Wood River.

Q. Were you present?

A. No, sir; it was done without my knowledge.

Q. Was that signed without your authority?

—. ——.

Q. When did you first have knowledge of Exhibit "C" extending the time from the 27th day of November to the 27th day of December?

(Objected to by defendants because incompetent and im-
196 material. The original complaint alleges this extension by the plaintiffs without averring any special circumstances; objection overruled; defendants except to the decision.)

A. I received a letter a few days after from Anderson, begging me to ratify what he had done.

(SUTHERLAND:) We object to this answer, as it covers the same ground as the former question, which was rejected. We ask that it be stricken out.

Q. Did you ratify the act?

(Defendants object to the question as immaterial, no grounds laid for it in the pleadings.)

(Objection overruled); defendants except to the ruling.

A. I received the letter stating to me that he had extended the time 30 days by request of Mr. Winters. I think Mr. Reeser was in favor of giving 30 days, but that he had no authority to do it. (Last part of the answer—" but that he had no authority to do it"—is stricken out.)

Defendants' counsel move to strike out all of the answer as hearsay; motion denied; defendants except.

Q. How long after the date of Exhibit C?

A. It was November, '83. It must have been along about the 20th; cannot tell the date. It was before Winters got back from Hailey.

Q. Did he send you a copy?

197 A. I think he did.

Q. Was your information before or after the thing was executed?

A. It was after. I had no knowledge of it at all until I received that letter.

Q. What, if any, knowledge did you have before that that such an instrument or such an extension would be given?

A. I never had any knowledge or intimation of it.

Q. What, if any, directions had you given to Anderson to execute it, or what authority?

(Objected to by defendants as incompetent and immaterial; objection overruled; def'ts except to the ruling.)

A. I have never given him any authority to extend the time.

Q. You afterwards ratified this?

(Same objection by defendants; overruled; exception by def'ts.)

A. I did at one time, many weeks after that. I did not ratify it when I received the letter, and I want to tell why I did not.

Q. When did you ratify?

A. After I went and talked with Anderson at Hailey.

(Objected to by defendants, and motion made to strike out; same ground as before; overruled; def'ts except.)

Q. In what month was that?

A. In December—between the 6th and 8th of December.

198 Q. When did you leave Rocky Bar that fall?

A. I think on the 3rd day of December, '83, for Hailey.

Q. When did you return next to Rocky Bar?

A. Some time in May, '84.

Q. You did not return until the commencement of this suit?

A. No, sir.

Q. What knowledge have you as to the defendants working the mine after you left Rocky Bar, on the 3rd of December, '83, prior to the commencement of this suit?

(Objected to on the ground that knowledge is admitted in the

pleadings and no issue thereon; overruled, and def'ts except to the ruling.)

A. By letter.

Q. From whom?

A. Mr. Fitzwater, and I don't know how many more; three or four others, I guess.

Q. What assent did you give to their working after the 27th of December, if any?

A. I did not give any.

Q. What knowledge did you have of the working after the 27th of December and the commencement of this action?

(Objected to for same reason as to the former question, as to the 3rd Dec.; overruled, and excepted to by def'ts.)

A. I received letters from Reeser that they were still at work.

199 Q. What directions, if any, did you give Reeser in consequence of receiving such information?

(Objected to by defendants as immaterial; objection overruled, and def'ts except.)

A. I directed him by letter to make a demand at once for the property—Vishnu and other mines—that we had leased.

(Def'ts move to strike out the answer as not the best evidence; overruled, and exception by def'ts.)

Q. You stated yesterday that you were familiar with the workings and condition of these mines at the time the lease was granted.

A. I misunderstood the year; at the time this lease was granted I had not been in the mine for several months.

Q. The time Exhibit C was granted?

A. Yes; but the year and winter before I had been in the mine very frequently and was in the mine after the lease was granted, but for several months before the lease was granted I had not been in the mine.

Q. How soon after the lease was granted to Winters and others, Exhibit A, were you in the mine?

A. I think a few days afterwards.

Q. Who was with you?

A. Mr. Parkason, I think, is his name. We went all through the mine. I kept a diagram of the work from my former lessees.

200 Q. What lessees?

A. Kitto & Co.

Q. How soon after this lease was granted, on the 19th of September, was it that you went with Parkason?

A. I think two or three days; very soon after. It was before they sold out to Winters.

Q. Before Winters had possession?

A. Yes, sir; before he had purchased the lease of Kitto and

others he wanted me to go and see what the lease was worth for the unexpired term.

Q. Is that the map of the workings of the Vishnu?

A. Yes, sir.

Q. Can you explain from that map the condition of the mine, the ore bodies, at the time you made that visit?

A. Not fully. I am not as familiar with it as I might be. The exact amount of work that has been done I don't know.

(Plaintiffs' counsel states that the map is offered to explain the workings of the mines. Defendants object until the map is verified. Witness states that he cannot explain the map fully.)

Q. What ore bodies were visible in the mine at the time you made the visit in Sept., '82?

201 A. There was a great many ore bodies, various stopes, some four or five, I think, in different places that were pointed out to me.

Q. What do you mean by stopes?

A. I mean ore bodies above the main tunnel; up-shafts of ore.

Q. Which tunnel do you call the main tunnel?

A. The Montana tunnel as laid down *as laid down* on this map.

Q. Can you point it out on the map?

A. I think I can. (Witness here points out on the map.)

WITNESS: The object of taking the map was that they wanted to sell that lease to Winters & Co. and wanted my opinion as to what it was worth. I placed it at $5,000. I remember seeing three or four stopes and veins, but could not point them out on this map as to just where they were. There was quite a lot of ore in sight; so much so that I told them that I thought they would not be justified in selling the lease for less than $5,000; that they could take out more than that during the unexpired term.

Q. From the examination of the mine at that time and the value of the ore in sight, or more properly the or- bodies in sight, what was the value of that mine at that time?

—. ——.

202 Q. Are you familiar with the value of mining property in Rocky Bar for the last ten years?

A. I think so.

Q. With the different sales, bonds, &c., that have been made there?

A. Yes, sir.

Q. Are you familiar with quartz-mining property there?

A. I think so.

Q. Have you had considerable transactions in bargaining and selling mines?

A. Have had considerable in bonding and some in selling.

Q. And you know a great many more that you was not interested in?

A. Yes, sir.

(Counsel now renew the question as to the value.)

A. I would have considered the mine worth one hundred thousand dollars. I thought so when I leased it.

Q. When was you last in the mine?

A. I think it was in November, '84.

Q. What examination of the mine did you then make?

A. I was in it two or three hours at one time; examined all the tunnels, shafts, &c.

Q. State fully what parts you examined.

A. I looked at the stopes where they had been at work; did not go to the stopes.

Q. What did you examine?

203 A. I did not go up in the stopes to examine where they left off work, but examined the shaft that they had sunk some 30 or 40 feet and a little tunnel that they had run; that was run in the winter some time—in January, I think.

Q. What examination did you make of the ore bodies now disclosed in the mine, if any?

A. So far as my examination went, there was only two. I examined the tunnel running to Dixie gulch. I examined the bottom of that tunnel and looked at the ore bodies along the tunnel. Then I examined the shafts and winz- that they had sunk some 35 feet down to the tunnel that my former lessees, Mullaly and Fitzwater, had run. They sunk this shaft down to connect with the tunnel.

Q. What was the condition of the mine at that time?

A. I only saw two ore bodies.

Q. When was this?

A. November, 1884.

Q. What was the condition of the mine as to its preservation, the works, timbering, &c.?

A. It was moderately well done.

Q. As to caves?

A. It was breaking down in two or three different places; there was quite a cave.

204 Q. Where was that?

A. Near the mouth of the tunnel the lagging had been broken down.

Q. Which tunnel?

A. Montana tunnel—our working tunnel. There were other lagging giving away, and I had them repaired. One of the timbers in the shaft was giving away and I had it fixed. It was in such condition that if it had been let alone until this time I think there would have been a great deal of damage.

Q. What was the relative value of the mine from the developments of ore bodies in sight at the time of the last visit as compared with the former visit that you have described prior to the defendants taking possession?

A. There is not near as much ore in sight now as when I leased to defendants; not near. If there is I could not find it.

Q. What was the relative value? You say that there is not as much ore visible now as there was at that time?

A. The valuation was the ore in sight; that is the way I place the valuation.

Q. Answer the question.

A. It is not as valuable, according to the ore in sight.

Q. When did you first have notice or knowledge of the
205 operations of Mr. Cavanah, as testified to by Gen. Winters?

A. I never had any knowledge of it, except what Reeser would tell me. He talked something to me about Cavanah getting money and going to see Wall and going to New York, but I thought it was all bosh and paid no attention to it.

Q. When did he first tell you?

A. The last of December or first of February I think it was that he wrote to me. After he came down he told me about it.

Q. Down here?

A. Yes, sir.

Q. When was that?

A. I think it was in January. I told him there was nothing in it. I had knowledge somewhere in February, I think, or the last of December.

Q. December, January, or February?

A. Yes, sir.

Q. What assent, if any, did you give to that business?

A. I did not give any.

Q. When did you first have notice of the Wall letter spoken of by Gen. Winters?

A. I think that was just before the end of the lease of the 27th of December. He wrote to me about Col. Wall, I think it was, before the 27th day of December. I am not sure about the date. I
am pretty sure that it was. I receive so many letters with
206 regard to those things that I cannot tell the dates.

Q. Where was you at the time?

A. Boise City.

Q. Speaking of the Wall letter, Mr. Winters testifies as follows (reading the same regarding the letter and the conversation relative thereto). You say you think you heard of it the latter part of December?

A. I think it was December; it might be the first of January.

Q. What, if any, authorization did you give to them?

A. I did not give any.

Q. Have you visited the mine more than once since the injunction was served?

A. Yes; three or four times.

Q. Have you at any of those times made any measurements of the works performed by the defendants?

A. No, sir.

Q. Are you familiar with mining work in Rocky Bar?

A. Yes, sir.

Q. Been familiar with it for years?

A. Yes, sir.

Q. Including contract work?

A. Yes, sir.

Q. What is the usual price for running and timbering a
207 tunnel in the way tunnels are run and timbered in that mine by the defendants?

A. I should say about seven dollars a foot, furnishing the timbers themselves.

Q. The contractors furnishing them?

A. Yes. You can contract any amount at that price.

Q. What is the usual price for sinking a winz-? Is that winz- timbered?

A. Yes; partly.

Q. The way that is timbered?

A. I should think probably sinking a winz- would be $7 or $8 a foot—$8.00, probably. I did not notice the size.

Q. Is any part of that winz- raising?

A. Yes; part of it. It might be worth eight or ten dollars a foot.

Q. What is the usual contract price in that place for stoping ore?

A. From four to six bits a foot.

Q. What does that include?

A. Taking out and delivering it on the dump.

(By KIRKPATRICK:)

Q. Do you mean cubic feet?

A. Yes, sir.

Q. What other classes of work have the def'ts done there besides this that I have mentioned?

A. They have not done anything but sink the winz-, running the tunnel, and stoping out the ore.

Q. Was there any other drift-work besides the tunnel?

208 A. Yes; I believe there was a cross-cut running north. I did not go into it. I do not know the distance from my examination.

Q. Would they be the same price as running a tunnel?

A. Yes; the same character of ground.

Q. Do you recollect a visit in March, '83, when you was at Warm Springs, above Boise City, that you received from Winkelbach, one of the defendants?

A. Yes, sir.

Q. Do you recollect having a conversation about the mine at that time?

A. Yes, sir.

Q. About the proceeds of some bullion?

A. Yes, sir.

Q. You heard his testimony yesterday?

A. Yes, sir.

Q. What was said at that time about an extension of time beyond Nov. 27th?

A. It was not intimated.

Q. What was said about any necessity of an extension of time?

A. Nothing intimated at all.

Q. Winkelbach swore that you said, after asking about the mine,

that if the money was not all paid by the 27th of November it would make no difference.

A. I don't know how he came to swear it.

209 Q. Will you say any such thing?

A. No, sir; that conversation did not come up.

Q. Had you any information at that time about their probable inability to pay?

A. I thought they could pay.

Q. Did you have any conversation in March?

A. I did, with Winkelbach. In talking about the mine he said that the mine was looking splendidly.

Q. What information did you have at that time about their not being able to pay and wanting an extension?

A. None; had no such conversation.

Q. Winkelbach says that he had a conversation with you at Rocky Bar in which you said that if the money was not paid by the 27th of November it would be all right, as long as you were secured for your pay. Did you have any such conversation in June?

A. It was impossible that I could.

Q. When did you have a conversation with him?

A. I had a conversation with him in July. I wanted him to pay me some money.

Q. What did you say in that conversation?

A. I told him positively that if they did not pay for it on or

210 before the 27th day of November that they must go out; that I would not wait. That was in July, '83. I told Winters the same thing. It was in the knowledge of everybody that I never intended to wait.

Q. Mr. Winkelbach swears that he went to see you at Warm Springs and asked you where you would have your money left.

A. Yes; that is correct.

Q. Please state that conversation.

A. He asked me if I wanted the money.

Q. What money?

A. For my part of the bullion—some $4,800 in bullion that he brought down with him. Before I answered the question he asked me if I would let him use my part of the money. I said, Yes; when you get home send me your note, which he did. I have the note in my pocket now. I said leave $200 at Mr. Falk's, and the balance you can use. When you get out home take out the $200 from what is due me from the run and send me your note. He did so.

Q. Was anything said about putting it in his safe?

A. About mine after this in case I did not go up. It was in March he said, "What will you have done with your money?

211 We are now running. What will you have done with your part if you are not there?" I said just put it in your safe. He said, "If I want to use it can I do so?" I said, Certainly; if you do send me your note.

Q. That conversation about putting it in your safe was about subsequent money?

A. Yes, sir; afterwards if it was necessary for him to use the money he was to do so. When I went there in July they had used $6,200, but the mine was looking all right, and I thought it was all right.

Q. What did he say about the condition of the mine then?

A. Very flattering, and thought it was paying. He said it paid $4,800 out of one run; that was the amount of bullion he brought down with him. He said the mine was looking splendidly, and was feeling very cheerful over it.

Cross-examination.

Q. Were you familiar with the mine property at the time the lease or contract was made?

A. Tolerably so.

Q. I understood you to say last evening that while Kitto was working it and during the following summer you was frequently in the mine.

212 A. Yes, sir; I was.

Q. When that contract was made with the defendants did you not inform them that you had not been in the mine in two years?

A. No, sir; I could not have done any such thing as that.

Q. I am speaking of the conversation that you had at Rocky Bar immediately before the contract was drawn?

A. That is improbable; there was no such conversation.

Q. With all of them nor with either of them?

A. No, sir; nobody.

Q. You say that Mr. Ganahl was at that time your attorney?

A. Yes, sir; he had been, and I consider that he was then.

Q. Was he your attorney in anything connected with these mines?

A. Not particularly connected with the mine.

Q. In what matters?

A. In other matters outside.

Q. Had he any case in court for you?

A. There was no case in court that I know of. I had retained him.

Q. Was he under a general retainer?

A. I don't know that he was.

Q. Did you not know that he was under a general retainer

213 for Gen. Winters and Mr. Winkelbach?

A. I never heard of Gen. Winters until he came over there.

Q. You did meet at that time?

A. Yes, sir.

Q. Did you not know at that time that Mr. Ganahl was his attorney and Winkelbach's?

A. Not Winkelbach's. I had heard that there was some case over in Wood River that he was attorney in for Winters.

Q. Did you not know that he was a regular attorney, under a general retainer, for Winkelbach?

A. No, sir; I did not know that he was attorney for Winkelbach.

Q. How did that meeting of the defendants with you and Mr. Reeser occur at Rocky Bar to talk up the contract; was it a casual meeting or was it an appointment?

A. I suppose it was an appointment.

Q. How was it brought about?

A. I knew nothing about Ganahl coming to Rocky Bar for any particular purpose until he arrived. Mr. Winters came there a few days before. I knew nothing about his business.

Q. Had you not had previous correspondence with Ganahl on the subject of the purchase of this property?

214 A. I don't remember that I ever have. He might have written me about the mine. Whether it was for sale or not I don't remember.

Q. Did you not exchange letters with reference to the three parties who finally entered into the contract, negotiating with you for its purchase?

A. I think not. If I have, it has entirely slipped my memory. When he came I had not the remotest idea of his business.

Q. Then why did you say you supposed the meeting occurred by appointment?

A. When he came he requested to see me.

Q. You think, then, the appointment was made after his arrival?

A. Yes, sir; he came in and requested me to walk up to Winkelback's store with him and I went up. He then told his business; that he wanted to purchase the Idaho and Vishnu mines.

Q. That was the first that was ever said or written about the mine?

A. That is the first that I remember, although he might have written and I might have answered. I was somewhat astonished when Ganahl came over and told me that he wanted to buy the mine.

215 Q. What was the occasion of your astonishment?

A. He told me he could get a mine in sixty days, and it astonished me that the man would want a mine, and get the money in 60 days.

Q. You think that was the first time it had been mentioned?

A. I think so, although he might have written me about it.

(Shows witness a paper.)

Q. Is that your signature?

A. I think it is.

The paper is here marked Exhibit A by the court for identification.

Q. At what particular place in Rocky Bar and with whom did you agree upon the terms of this instrument that was executed in September, '82?

A. I think it was in Winkelbach's store where we settled upon the terms of the lease.

Q. Was Reeser present?

A. I think not.

Q. Who was present representing the defendants?

A. I think Winkelbach was there. I am sure he was there; I remember Ganahl speaking to him.

Q. Was Gen. Winters there also?

A. Not then.

216 Q. State what was agreed upon in that conversation. You may state the conversation if you are able to do so.

A. I told them that I would not sell the mine in that way; that it would take money to purchase the mine.

Q. In what way?

A. To give a note and mortgage. He proposed to give me a note and mortgage payable in 60 days. I told him that I would not sell the mine in any such a way; that if he wanted to buy the mine I would give him an option for it for 60 days, but would still hold the mine and work it. He tried to convince me that he could get the money in 60 days; spoke of several parties. I told him that it was nonsense to talk about it. Then he went on and told me that he had one of the best miners in the world and wanted to get him a situation. He spoke of Gen. Winters as being a great miner, and that he wished I would do something for him to assist him. He asked me: "What can you do?" "We are over here to get a mine." I studied a few minutes and finally I said to him: Ganahl, I will tell you what I will do; I will lease you the mine for a year (they had told me that Winkelbach was going in with them), and

217 if you can draw up such a paper or lease as will secure me I will lease you the mine for one year and charge you one-half the gross proceeds as royalty, and charge you $40,000 for the mine; and if the royalty—one-half the gross proceeds—pays the $40,000 during the year I will then give you a deed, or if the royalty pays part of the purchase-money and you raise the remainder, making up the $40,000, I will make you a deed. He says: "That suits me better than the other." We agreed at once; he came to my proposition.

Q. When did you take any steps to have it reduced to writing and consult Gen. Winters?

A. I never consulted Gen. Winters.

Q. Did you not have any conversation with him?

A. Not that I remember. Yes; I think the next day Gen. Winters, before the writing was commenced, said: "Did you not bond this mine once for $35,000?" I said yes, and he said you are charging us $5,000 more. I said yes, that is true, but I am giving a lease upon the mine with a privilege to purchase, and you have it all your own way; you can work the mine one or two months

218 or quit it at any time. If the mine pays, you can keep it, and if not, you can throw it, and it seems to me that $5,000 more is not too much.

Q. Is that all the conversation?

A. I think that was all.

Q. Was the conversation between you and him alone?

A. Yes; in the back part of Winkelbach's saloon, in the billiard-room.

Q. When you parted the day before was there no understanding that anybody should reduce this to writing?

A. We had been talking about it.

Q. You had agreed upon the terms?

A. As far as Ganahl and Winkelbach was concerned, we agreed upon the terms.

Q. Was that conversation with Winters the following day?

A. I think that was the only conversation I had with him.

Q. Had you seen either of the other parties before you saw Gen. Winters?

A. It was the day before that we had the conversation with Ganahl.

Q. Had you seen either of the other parties in the meantime?

A. I saw them, but don't remember that I had any conversation.

Q. When you came to the office for the purpose of having the contract read who were present and what was said?

219 A. I don't remember of any person being present but Ganahl, Winters, and myself, but there might have been.

Q. Where were you then?

A. In Newcomer's Hotel.

Q. Did you remain there during the drafting of the instrument?

A. No, sir; I was in and out. I was called in two or three times. They started two or three and they were wrong, and they burned them up.

Q. After the agreement was drafted then the conversation occurred that you related in your examination-in-chief?

A. That was just before the signing.

Q. I understood you that a few days after the signing of that instrument you visited the mine with Parkason?

A. Yes, sir.

Q. That you found four ore bodies?

A. Yes, sir; I think there was three or four.

Q. Was Mr. Kitto in the mine at that time?

A. No, sir; I think not.

Q. Where was he?

A. I do not know.

Q. Were any of his employees in the mine?

A. There was men in the mine.

Q. Do you remember who?

A. Charley Davey was one, I think.

220 Q. In what direction does the Montana tunnel run?

A. It runs a little west of north, I think.

Q. Runs nearly north & south?

A. A little west of north.

Q. Where were those ore bodies with reference to that tunnel?

A. Some of them east and some west.

Q. How many west?

A. The principal part, I think, was west when I was in.

Q. Do you think three of the four?

A. I think about three ore bodies west and one east.

Q. Were the ore bodies lying immediately upon the Montana tunnel disclosed?

A. They had been crossed by the Montana tunnel.

Q. Leaving part of the ore body on one side and part on the other?

A. Yes, sir.

Q. How far from the mouth?

A. Some 350 feet, I presume.

Q. The first one?

A. No, sir; the first one is 150 feet or 200 feet. They were not at work on them.

Q. How much show of ore was there in that first ore body?

A. I don't remember particularly.

Q. Describe its dimensions.

A. I could not do it.

Q. Had it been stoped out at all?

A. Yes, sir.

221 Q. Beyond the dimensions of the tunnel?

A. Yes, sir.

Q. How far?

A. I could not tell you—50, 60, or 70 feet.

Q. Which way?

A. West from the tunnel.

Q. Did you go to the face of the work?

A. I don't think that I did.

Q. Had they not worked out that body on that side?

A. The ore was there.

Q. The ore for 60 or 70 feet?

A. Yes; there was a body of ore there.

Q. What do you mean by stoping out?

A. They had stoped out for some distance. I could not tell how long the ore body was.

Q. What was the width of the ore body and the hight?

A. I don't think it was up over 30 or 40 feet.

Q. Do you mean that they had stoped 30 or 40 feet from the level?

A. Yes; 30 or 40 feet to the roof.

Q. What width?

A. Some places a foot or foot and a half.

Q. Do you mean the dimensions of the opening?

A. Part of it.

Q. When you speak of being 30 or 40 feet from the roof

222 you mean a room had been stoped?

A. That was the end.

Q. Did you go to the roof?

A. Close enough to see it.

Q. They did not follow the stope to the end?

A. I don't know what you mean. I don't know that they followed it to the end.

Q. Do you mean to be understood that there were ore bodies all around in stoping?

A. I mean ore three or four places.

Q. I mean the place you described of 60 or 70 feet long. You spoke of a room 30 or 40 feet. Now, — there ore in sight all around on the walls of that stope?

A. It did not run around.

Q. Did you see ore in the walls of that stope?

A. I don't mean what you mean by walls. Do you mean the wall rock of the mine?

Q. How much ore did you see and in what direction?

A. I cannot tell you how much ore I saw.

Q. How much surface ore did you see?

A. From 40, 50, or 60 feet along in a line.

Q. How wide?

223 A. I don't think any place it was over a foot or a foot and a half.

Q. Did you stand on the floor of that stope in making this investigation?

A. Yes; I walked along and he showed me the ore.

Q. Was it stoped out any on the other side of the tunnel?

A. On which side do you mean?

Q. I speak of the other side.

A. I don't understand it. The stope I describe is on the west side of the tunnel.

Q. Was it stoped out on the other side?

A. I may misunderstand you. You might mean the stoping in beyond.

Q. How is it on the east side?

A. There is no stoping done there.

Q. What evidence of ore is there?

A. A vein about four feet wide.

Q. Do you know the richness of the ore?

A. I think it was low grade.

Q. What do you mean?

A. Fifteen or twenty dollar ore.

Q. By what means do you know that it would go 15 or 20 dollars?

A. Nothing positive; only that it has been sampled by a party. I would put it at 15 or 20 dollars.

Q. You are simply exercising your judgment?

A. Yes, sir.

224 Q. Where is the second body?

A. The third body, I would call it, is down 30 or 40 feet below the level of the tunnel.

Q. Now, in getting to the third body there must have been a second?

A. I regard the second body of ore on the east side of the tunnel.

Q. Describe the locality of the 3rd.

A. That is down at the end of the tunnel that was run by some lessees that I had.

Q. Give their names.

A. The two Nicholsons & Mullaly.

Q. What is the name of the tunnel?

A. There is no particular name to that tunnel; it is a tunnel that we continued from the "Confederate Star" mine. We continued the tunnel on from the work into the Vishnu & Idaho mines.

Q. Where in that tunnel did you see this ore body?

A. In the eastern end.

Q. Describe the dimensions.

A. The dimensions were about a foot, I guess, or 18 inches.

Q. Its value?

A. I don't know its value at that spot. The value of the ore taken out not a great way west from there——

225 (SUTHERLAND:) I did not ask you for that. Was there any other body?

A. Yes; there was another little chute somewhere, but I cannot locate it. I think there were four ore bodies at that time.

Q. Can you describe it?

A. Not very well; I only remember that there was a small stope somewhere that was west of the tunnel, I think, on another vein.

Q. Where was the third ore body with reference to the Montana tunnel?

A. West of the Montana tunnel.

Q. What was its situation with reference to being in the same level?

A. 30 or 40 feet below.

Q. How far west?

A. I think about 80 feet.

Q. Had you ever seen this body of ore before?

A. Yes; often.

Q. At how early a date?

A. When they were first struck by Kitto & Co.; the first year of their lease. I was in every few days.

Q. Had it been disclosed prior to '82?

A. Yes, sir.

Q. When?

A. The tunnel run through the ore bodies. I think it was the first year of their lease—in '81.

Q. Did they run the Montana tunnel?

226 A. They continued that tunnel for some distance; probably 80 or 90 feet.

Q. Did they open the Montana tunnel through the first ore body?

A. That had been disclosed before.

Q. How long before?

A. I could not tell you. The Montana tunnel was probably run 15 or 16 years ago. That ore body and that vein I did not count with the ore that was disclosed by Kitto & Co.; that was disclosed by a man named Cramer. I purchased his mine.

Q. The ore disclosed by Kitto & Co. was in the other bodies?

A. Yes, sir.

Q. There was, then, only one ore body disclosed by Kitto & Co.?

A. I said there was three or four.

Q. You say the Montana tunnel run beyond the first two ore bodies before they went in?

A. I said the first mine—I think it was the "Golden"—was disclosed by Cramer.

Q. I was speaking of ore bodies—one on the west side and one on the east side—from 150 to 200 feet from the mouth. I understood you to say that the Montana tunnel run to a point beyond that, 15 or 16 years ago.

A. No, sir; that is not right. The first mine that was
227 struck was 150 to 200 feet from the mouth of the tunnel. The first ore body was already disclosed when Kitto took the lease.

Q. How long had it been disclosed?

A. Probably 15 or 16 years. You had this body in 300 or 400 feet when it is only 150 or 200 ft.

Q. I understand you to say now that the Montana tunnel had been run beyond these two first ore bodies 15 or 16 years?

A. I have not given you a description of that body.

Q. I asked you at the beginning to describe the first ore body and you describe it. Then you commenced to describe the third ore body, and then I said you had not described the second.

A. I understood you to say by Kitto.

Q. I asked you to describe the four ore bodies you saw in the mine 3 or 4 days after this contract was made.

A. I did describe them. I have not described the first ore body that the tunnel passes through.

Q. I did get a description of what you said was an ore body, from 150 to 200 feet from the mouth of the tunnel.

A. You wanted me to describe the ore bodies disclosed by Kitto.

228 Q. Does either of the four ore bodies that you saw at your visit open into the Montana tunnel?

A. Yes, sir.

Q. Take the one nearest to the mouth of the tunnel and describe it.

A. I have seen the vein, off and on. I did not call this a mine; did not understand that you wanted me to describe the first one that I saw on my visit.

Q. I want a description of one of the four ore bodies. I am speaking of this as one property; you are speaking of this property generally as one. You saw four ore bodies. I want a description of them.

A. I have not given a description of the first ore body in the mine.

Q. Would that be a fifth ore body?

A. I presume it would. That part of the mine has not been worked for the last 6 or 8 years. I think six years ago they attempted to work that vein, but the water was so deep that they could not work it. I did not think of describing that at all.

Q. Did you attach any value to it?

A. I did attach some value to it, but in its present condition I did not describe it. That was not included in the four.

229 Q. The four ore bodies are those that you did describe?
A. Yes, sir.
Q. The Montana tunnel runs between these you described as first and second, does it?
A. No, I don't understand it so.
Q. You described the first ore body as being on the east side?
A. Yes, sir.
Q. You say the third is in another place?
A. Yes, sir.
Q. And the second was on the other side?
A. Yes, sir.
Q. Then the Montana tunnel must run between the first and second?
A. The vein that the Montana tunnel crosses it is very hard to tell just whether it is the Vishnu or Idaho vein.
Q. You are speaking of ore bodies, not veins?
A. One is on the east of the Montana tunnel and the other bodies are on the west.
Q. Was the Montana tunnel run up to that point prior to the Kitto lease or by them?
A. It was run by them.
Q. They disclosed those ore bodies?
A. Yes, sir.
230 Q. I understand you to say that you thought the mine at the time of the execution of this lease was worth one hundred thousand dollars?
A. I think so.
Q. Did you ever negotiate with anybody?
A. No, sir.
Q. Did you ever bond the mine?
A. Yes, sir.
Q. How many times?
A. Several times. I have bonded that mine for the last 15 years.
Q. At prices ranging from what to what?
A. The last bond was for $35,000.
Q. That run from what time to what time?
A. I don't remember the year that bond was given.
Q. State as near as you can.
A. I think it was during Kitto's lease.
Q. How long had that lease to run?
A. Two years.
Q. It expired the 27th of November, '82?
A. Yes, sir.
Q. It must have been made in '80?
A. I presume so.
Q. Was there any bond expiring at the time that was given?
A. I presume all the bonds had expired that I had given.
231 Q. I ask whether there was an outstanding bond expiring at the time you made that bond, or was there an interval between the previous times when the mine was not bonded?

A. There might have been an outstanding bond. The party might have kept it for a few months and returned it.

Q. To whom was the last bond?

A. Alexander Pfeiffer.

Q. You have testified that it was bonded for 15 years. To whom was it bonded next before that?

A. I don't know. I had it bonded once to True Rollins.

Q. When?

A. Year before, probably, in '79.

Q. At what price?

A. I think my portion was $25,000 that I was to get.

Q. Who had another portion in it?

A. Jacob Reeser; but he did not bond his interest. That bond was returned to me, I think.

Q. Do you remember any bond before that?

A. There was a good many bonds before that?

Q. Do you remember any one before that?

A. Yes; I remember it was bonded in London once.

Q. When?

232 A. 8 or 10 or 12 years ago.

Q. How much for?

A. I think it was sixty or seventy thousand dollars.

Q. Was there any later bond that you remember?

A. It seems to me there was, but I don't remember who.

Q. Did you bond it to Mr. Prickett afterwards, Judge, to get a purchaser?

A. I cannot tell you.

Q. Was it worth more in 1880 than it appeared to you to be worth for 10 years before?

A. The mine had been getting better; the more work the better it seemed to be.

Q. How much was it worth in 1880, as you estimated it at that time?

A. When I bond a mine I don't bond it at its value.

Q. What, in your judgment, was it worth in '80?

A. I can give you the value for every year.

Q. I want to know what you thought the mine was worth in 1880.

A. Sixty, seventy, or eighty thousand dollars.

Q. How much in 1875?

A. I did not value it quite so high; probably $50,000.

Q. What in 1877?

A. It ought to have been worth $70,000 or $80,000.

233 Q. Did you not think it was not worth anything at that time? Did you not swear at that time it would not pay wages?

A. I might.

Q. I mean this property.

A. There was times in working that mine that it would not pay wages.

Q. Did you not swear in '77 that it would not pay wages?

A. I think there was one time in '77 or '78 that I don't think the

mine would pay wages at the present openings, but that had nothing to do with the value of the mine.

Q. Did you not testify this morning that the value of a mine was determined by the value of the ore in sight?

A. To some extent, but a mine may be valuable for all that.

Q. Did you swear in '77 that it would not pay wages?

A. I presume I did, under the lease that it did not pay wages. There were several times that it would not pay wages, working it at a disadvantage; that has nothing to do with the value of the mine.

Q. Do you know Mr. Thomas Johnson?

A. Yes, sir.

Q. Did you have any conversation with him at Hailey
234 last June about this mine?

A. I think he asked me why I did not take the money.

Q. Did you not tell him in that conversation that you did not think it was worth one thousand dollars?

A. No, sir; I did not.

Q. Do you remember a visit that Winkelbach made to you to say that he came there to see where you wanted your royalty left? Did he use that word?

A. I don't know as he did. I think he said "royalty" or "your part of the money;" could not tell whether he used that exact word.

Q. Did you ever use that word in your conversations with the defendants?

A. Always.

Q. Can you identify any place?

A. When I received any money I received it as royalty.

Q. You say the money was paid to you as royalty?

A. Yes, sir.

Q. Do the receipts state that it was paid as royalty?

A. They state it was paid as the lease called for.

Q. Does it state the payments in that way?

A. Yes; as per lease.

Q. Do they not refer to the contract to purchase?
235 A. No, sir; "as per lease."

Q. There is no reference in the receipt to contract to purchase?

A. I wrote out a receipt and gave it to Winters to write receipts from.

Q. Did the expression occur "as per lease?"

A. Yes, sir.

Q. Do they say how the money is to be applied?

A. It is applied as purchase-money, as per lease, referring to the lease.

Q. Was there anything said at the time of payment indicating that it was paid as royalty?

A. It was understood.

Q. Was anything said?

A. I don't know whether there was or not. The receipt I gave him to copy from stated that the money was paid upon the mine as

per lease; and if the $40,000 was paid, then the royalty was to be applied as purchase-money.

Q. Is that in the lease?

A. It did not state "a royalty." It states that $40,000 to be paid out of the gross proceeds or otherwise.

Q. When you was in the mine last November did you see those four ore bodies that you described as having seen a few days after the contract was made?

236 A. No; I only saw one of the four that I had seen.

Q. Did you go where you had seen the others—the four bodies?

A. I went to the stopes, but they were closed up and I did not go up.

Q. Do you know whether they had been worked out or not?

A. I do not.

Q. You were speaking of seeing two ore bodies on your last visit.

A. Yes; the other is along the tunnel.

Q. Were either of these ore bodies of the four that you saw before?

A. One was of the four.

Q. There was an additional body disclosed?

A. Yes, sir.

Q. Do you know whether either of the four had been worked out?

A. I don't know. I did not go up to see.

Q. I understand you to say that compairing those visits that it looked better on the former occasion.

A. I think it did.

Q. Now, if the four bodies had not been worked out and another had been discovered, why did it look worse?

A. Because I did not see any other ore body. I went along the tunnel where they had been stoping and the stopes were closed up. I did not remove the lagging to look.

237 Q. You was none the wiser for going?

A. Not particularly.

Q. Assuming that they were there, and that another additional body had been discovered, how do you account for saying that the mine looked worse?

A. It is natural that when a man works five or six months on an ore body that he would take out something. I think there is very little ore body left—that is, in sight—that was there when the lease was given.

Q. Do you know whether they have been worked out?

A. I do not, but I know they have been worked a good deal.

Q. How do you know?

A. I know they have been working on the mine.

Q. Did you go into the mine at any time during the time this lease was running, after this visit, two or three days after the instrument was signed?

A. Not until I went in December.

Q. Did you not find a good many new openings.

A. I found a tunnel running east.

Q. Did they have the Montana tunnel at the place where the ore bodies are?

A. It was a little further in, I think.

238 Q. I understood you to say that you advised Kitto at the time of your visit to the mine about what he should ask for the assignment of the lease.

A. Not Kitto, but Parkason. It was the Kitto lease. Parkason was the man I had the conversation with. He was one of the lessees.

Q. Did not their lease contain a clause that if you sold the mine while the lease was running the lessees should have $10,000 to give up their lease?

A. I think it did. I don't remember the amount.

Q. Is not that the amount?

A. I don't remember the amount. I think there was a clause.

Q. Did you state where the instrument was executed?

A. It was signed in the Alturas Hotel.

Q. Mr. Reeser's hotel?

A. Yes, sir.

Q. Who went with you?

A. Ganahl, Winkelbach, Winters, and myself and Sol. Newcomer.

Q. Did you go to the place in company with anybody?

A. I think we was altogether.

Q. Did you not go there in conversation on the way with Gen. Winters?

A. I might have had some conversation with him. I don't

239 remember now. I don't remember that he was along.

Q. On the way did you not state to Winters that Mr. Reeser had no right to any part of this property?

A. I could not make such a statement as that.

Q. I asked you if you did not.

A. I did not to Mr. Winters or anybody else.

Q. When you arrived there and before the instrument was executed you say all three defendants were there. You was there and Reeser and Newcomer?

A. Yes, sir.

Q. What occurred?

A. I would not tell all that was said; could not do it.

Q. Can you state anything?

A. I went over that this morning. I was somewhat at sea. I did not know whether lessees could run a mine in debt and hold the owner responsible for their indebtedness or not. I asked Mr. Ganahl if there was any such thing in law as men working a mine and the lessees running it in debt and the owners held for the indebtedness. He went on to explain the law; that there was no such thing in law; never was heard of, and could not be done.

240 He gave his reasons. I remember that waiver was drawn. I was in doubt, and thought there might be such a thing, because my attention had been called to it, and I tried to understand the law, but was unable to do so to my own satisfaction, but to be doubly sure he proposed himself to draw this waiver. He drew it

up as you see it. He said in that waiver that they are lessees; that they enter that mine as lessees and worked it as lessees and not as purchasers, and that it was impossible to hold the owners of the mine for the expenses of the mine. That was the object of the waiver. I fully understood it so.

Q. Do you remember anything else that was said or done?

A. They fully satisfied me that I was not getting myself into a trap; that the mine or owner could not be held. He said the owner could not be held. We do not enter the mine as purchasers. "We are not purchasers, but simply lessees." He argued that fully to my satisfaction and convinced me that I was in no danger whatever.

Q. Is that all that was done?

A. No; they all signed their names, witnessed by Sol. Newcomer.

Q. Was the instrument explained to Mr. Reeser?

241 A. He was present and heard the conversation.

Q. There was no conversation addressed to him personally?

A. He was there hearing it.

Q. Was there any explanation directed from you to him?

A. No; the whole thing was done right in his presence.

Q. Did you talk with him before about this lease?

A. Yes, sir.

Q. Explain it to him before these parties came?

A. Yes; I had talked with him. He seemed afraid of it.

Q. Is it not true that when you went there with these defendants you explained it to him as if it was a new thing to him and read it to him immediately before it was signed?

A. Yes; I think I did. I think Ganahl and Sol. Newcomer—I think we all did.

Q. You said that there was no direct statement to him.

A. There was no appeal made to him by me. The whole thing was talked to him. Ganahl told him its meaning, and I told him. I understood you to ask if I took him and talked to him. He heard all the conversation.

Redirect examination.

242 Q. In your direct examination, in giving the ordinary price at Rocky Bar for stoping, you said it was from four to six bits per cubic foot.

A. I did not mean that. The way contracts are let is 4 to 6 bits along the ledge for removing one foot.

Q. One foot deep and one foot high?

A. Yes, sir.

Q. The whole width of the vein?

A. Yes, sir.

Testimony of Jacob Reeser.

JACOB REESER, duly sworn, testifies as follows:

Q. You are one of the plaintiffs?

A. Yes, sir.

Q. Where do you reside?
A. Rocky Bar.
Q. How long have you resided there?
A. I went there first in '64. It has been my home since then.
Q. Do you know these properties spoken of on Idaho Hill?
A. Yes, sir.
Q. What knowledge did you have of them during the lease of Kitto & Co.?
A. I have been there frequently. I was one that leased it to them.
Q. How often did you visit that mine?
A. While they was sinking the shaft I was in every week.
243 Q. Which shaft?
A. That lower shaft.
Q. Did they do that in the fore or last part of their lease?
A. The last year.
Q. When did they finish that shaft?
A. It was some time in the spring of '82, I think.
Q. How often were you in the mine?
A. Frequently.
Q. When was you in there last before Kitto & Co. sold out?
A. I was in there frequently before; cannot tell justly how long; maybe a week.
Q. How long after they had sold out was you in the mine?
A. About the same time; first of the month, anyway.
Q. Where was Kitto & Co. working in there when you was in there the time before they sold out?
(Witness shows on the map.)
Q. Have you been in the mine since Winters & Co. stopped their work?
A. Yes, sir.
Q. What is the condition of that place now where the ore was at your former visit?
A. I guess that is about all worked out. There may be a little ore in here (showing on map).
244 Q. Where were you when this lease was executed?
A. At Rocky Bar.
Q. What was your condition?
A. I was kept in my room. I was unwell.
Q. Who first spoke to you about this lease?
A. I think it was Settle.
Q. How long was that before it was executed?
A. Only a few days.
Q. Who of the defendants first spoke to you about it?
A. I don't remember whether it was Winkelbach or not. I think it was.
Q. When was that?
A. Just before; few days before. His conversation might have been a week or four or five days before; cannot tell the exact time.
Q. When did you first have a conversation with Ganahl about it?
A. I don't know as I ever had a conversation with him except when it was signed.

Q. Who first brought you to the paper?

A. Ganahl.

Q. When was that?

A. I think the same day we signed them. He came up and said, I have brought the papers to you to sign. I asked him what papers. He said, Some papers between Settle, myself, and them. "I
245 told him that I wanted to see Settle first; that I would not sign them until I saw Settle." He went out and pretty soon came back with the others. Newcomer was with them.

Q. Was that the first time you saw them together?

A. Yes, sir; I was in bed then.

Q. Did you have any conversation there before you signed the papers?

A. Settle and I did several times.

Q. I mean at the time when they were all present.

A. Yes; Settle had some. He asked Ganahl whether he could trust him to draw them up all right; that he was the only lawyer that was there. Ganahl said, "Most certainly." He said, "My reputation as a lawyer is at stake;" "do you suppose I would do such a thing as that?" He asked him whether it would be necessary to have some paper; that the hands of the lessees might get after the shareholders of the mine, provided he did not pay them. Ganahl told him that there was no danger about that; that the men that worked for the lessees could not hold the mine for their money.

Q. What was done about that?

A. To satisfy him he said he would draw up a waiver.
246 He drew it, and they all signed it, these three, and Sol. Newcomer witnessed it.

Q. What paper do you mean—that Exhibit "B" attached to the complaint?

A. I mean the waiver.

(Shows paper to witness for identification.)

(WITNESS:) Yes; that is the paper.

Q. Where was that drawn?

A. In my room.

Q. You say Ganahl drew it?

A. Yes, sir.

Q. How did he come to draw it?

(Objected to as irrelevant. Question withdrawn.)

Q. What was said that induced Ganahl to draw that instrument? Who told him to draw it?

A. He offered it first himself; said he would draw it so we would be satisfied.

Q. Satisfy you about what?

A. That the men could not get advantage of us, and that it was nothing but a lease.

Q. What knowledge, if any, did you have of the manner or pur-

pose for which the defendants took possession of the mine? In what capacity?

A. Under a lease, of course, is the way I understood it.

Q. What knowledge, if any, did you have that they took possession as purchasers and not as lessees.

247 A. I never heard anything about that until I heard it here. We have always looked upon it as a lease.

Q. What knowledge, if any, did you have that they made their payments, not as a royalty or rent, but as purchase-money?

A. I never heard such a thing before.

Q. Did Winters ever give you such notice?

A. No, sir.

Q. Did he ever give you notice that he took possession as purchaser?

A. No, sir.

Q. Did he say anything in your presence before he took possession or at any other time during the lease to that effect?

A. No, sir.

Q. In what capacity did you work this ore?

A. As a hired man. I leased the mill to them first, and then worked for wages, for so much a day.

Q. At what time did you return to Rocky Bar in '83 or winter of '83 and '84?

A. November 20th, or some time in that neighborhood.

Q. From where at that time?

A. Boise City.

Q. How long did you remain there at that time?

248 A. I was in Rocky Bar until the 23rd of January, I think.

Q. Where was you when this extension was signed?

A. Wood River.

Q. What time was that?

A. That was in November, I think, after the 20th some time.

Q. Where did you go from there?

A. Boise City.

Q. Then when did you return from Boise City to Rocky Bar?

A. About the 20th of December. I meant December before.

Q. You returned there about the 20th of December?

A. Yes, sir.

Q. What was the condition of the streets and roads around Rocky Bar when you returned there the 20th of December?

A. I got in on a sleigh.

Q. Where were the quartz teams that hauled the quartz?

A. They were there.

Q. How long did they remain there?

A. I think they went out one or two days after Christmas, about the 26th or 27th.

Q. Turned out for the winter?

A. Yes, sir.

Q. What amount of ore was hauled after you returned on the 20th of December?

249 A. None.

Q. Did the quartz teams do any hauling after you returned?
A. No, sir.
Q. When was the next ore hauled?
A. None since that I know of.
Q. When was the ore hauled that was milled in January?
A. That was hauled before I got in; that was in the mill when I got there.
Q. So no ore had been hauled since you got there, on December 20th, from that day to this?
A. No, sir.
Q. When was this conversation with Cavanah?
A. I think it was the day before Christmas. He started out on Christmas morning.
Q. That the same conversation that Winters testifies to?
A. Winters was not there.
Q. I mean the conversation when Gen. Winters was present.
A. That was the day before Christmas.
Q. Cavanah started out the next day?
A. Yes. He started out the next morning; but the snow slid so he came back.
Q. It was the day before his first start that you had the conversation?
A. Yes, sir.
Q. State the conversation about Wall, etc., in presence of Cavanah and Winters.
250 A. There was none about Wall in their presence that I know of. I asked Cavanah when he would go out. The first conversation about Wall was with Winters.
Q. Cavanah was not present?
A. No, sir. I got in about the 20th, and the next day I saw Winters and asked him if he had heard from Vernon yet. He said, "Yes;" but that has gone up; but I have a letter from Ganahl, and he says that Col. Wall would raise the money or bank security. I told him to hurry up, because Settle would not give him any time after the 27th.
Q. When did you next have a conversation about that matter with Winters?
A. The day before Christmas I told Cavanah.
Q. Was Winters present?
A. Yes, sir.
Q. How did you come together that time?
A. We just happened to come together.
Q. Where was it.
A. In the hotel; don't remember whether it was in the office or in Winters' room.
Q. What was said at that conversation?
A. I asked Cavanah if he had been out to see if that man
251 had the money or would raise it.
Q. Where did Wall live?
A. At Hailey. I told him to go and see Wall and see if there

was anything in it and to write, because Settle would not wait after the 27th; that was repeated over again.

Q. What authority did you give Cavanah?

A. Not any; that was all I said to him. I could not give any authority at that time.

Q. Was there anything said in that conversation about I. Morris?

A. No, sir.

Q. Anything said about Isidor Morris?

A. No, sir.

(Counsel reads Exhibit A to deposition of Frank Cavanah.)

Q I will ask whether you ever heard of that transaction before Cavanah left?

A. I did not.

Q. Or Isidor Morris in connection with the property?

A. I never saw him until he came to Boise City.

Q. Did you ever see him in connection with the property up to this time?

A. Yes, sir.

Q. Have you ever authorized Mr. Cavanah to execute any such instrument for you?

A. No, sir.

252 Q. Did he hold any power of attorney from you?

A. No, sir.

Q. Have you ever requested him to make any such paper?

A. No, sir.

Q. When did you have the first notice of this paper?

A. The first notice was in November, in Hailey. Settle told me first.

Q. After the deposition was returned?

A. Yes, sir; I heard before that that they were talking about sending for a deposition, but did not know what it was. That was the first I heard that there was one there. Such a thing had never been talked about.

Q. What, if any, authority did you give Cavanah to extend the time under this lease, "Exhibit A."

A. I never gave him any.

(Counsel reads from transcript at pages 46 & 47 in regard to offer of extension of time.)

Q. What was said by you after your return from Boise City about giving them time to work out the balance of the price of the mine after the 27th of December?

A. I do not know of any encouragement.

Q. What did you say to him about having a chance to work the balance out of the mine?

253 A. I never said that to any one.

Q. What did you come to Boise City for?

A. To get out an injunction and stay them.

Q. When you left, then, it was to commence this action?

A. Yes, sir.
Q. Did you do anything a day or two before you left?
A. I made a demand for the possession of the mine.
Q. When was that?
A. I think it was on the 22nd of January, 1884, that I demanded possession of the property.
Q. How did you make that demand?
A. I got a witness and went and told him I wanted possession of all the mines that Settle and I leased.
Q. Why did you use Settle's name?

(Objected to as leading.)

Q. How did you come to make that demand?
A. Settle wrote me before that and told me to ask for possession of the mine.
Q. Settle requested you to make a demand?
A. Yes, sir.
Q. What witness did you take with you?
A. A man named Martin.
Q. Where did you make that demand?
A. In Winters' room.
Q. What did you say to him?
254 A. I asked him for possession of the mine, and he said he would not give it.
Q. Use the words of the conversation as near as you can.
A. I said, "I want possession of the Idaho and Vishnu mines." He said that he would not give it. I said I was sorry; that I had been a good friend to him as long as the lease lasted. He said, "I have got you for six months, anyway." I asked him what he meant by that. He said, "I have got you for six months; I can prove it by Cavanah." I said, "You cannot prove any such thing. You are a liar and a son of a bitch if you say any such a thing. This is the last time we will speak together. Hereafter you speak to the lawyer. To-morrow morning I am going to Boise City." That was the last conversation with him.
Q. Do you know the usual price of mining work in Rocky Bar?
A. Yes, sir.
Q. How long have you been engaged in mining there?
A. Ever since '64.
Q. What is the ordinary price for mining and timbering tunnels and drifts in such mines as those mines are?
255 A. It goes from six to $8.00 if the contractor will find everything—six or eight dollars per foot.
Q. What is the ordinary contract price for sinking winze such as the def'ts sunk in that mine and timbering it the way they timbered it?
A. I paid 10, 12, and sometimes $16.00 for sinking; but we generally raise them where we have a good chance like that.
Q. What is it worth to raise it?
A. About half.
Q. Do you know whether that winze was raised or sunk?

A. I do not.
Q. Have you any means of knowing?
A. Would think it was raised, but would not be positive. I was not there at the time.
Q. How many feet of drifts and tunnels did Winters & Co. run in that mine while they had possession?
A. 625 feet.
Q. Have you measured them?
A. Yes, sir.
Q. Point them out on the map. What is the depth of the winze that he sunk or raised?
A. 32 feet.
Q. What is the length of the drifts from the winze?
256 A. He run about 5 or 6 feet up to this other winze (referring to map).
Q. When was your conversation with George Kelly about his getting your place in the mill? Was it before or after you went to Boise City?
A. If ever I had one it must have been before I went to Wood River. It was about November 1st that we made a run before we went out there—in the fore part of Nov., '83.
Q. Is that the time you went to Wood River?
A. I think we left about the middle of November to go to Wood River.

MARCH 4TH, 1885.

(Cross-examination of REESER:)

Q. How long have you known Mr. Cavanah?
A. I think some 8 or 10 years.
Q. Where did you first get acquainted with him?
A. Rocky Bar.
Q. Do you know him very well?
A. Yes; pretty well.
Q. Did you both live in that little town together?
A. He only lived there about a year; then he went to Atlanta.
Q. How far from Rocky Bar?
A. Eighteen miles.
Q. Did you see him frequently?
A. Yes, sir.
257 Q. Were you not on friendly terms with him?
A. Yes; always have been.
Q. Is Mr. Cavanah an honest man?
A. I don't know.
Q. What has been your opinion of it?

(Objected to, and question withdrawn.)

Q. From your knowledge of Mr. Cavanah do you think he would sign your name to a paper without some authority from you?

(Objected to as incompetent and immaterial. Objection sustained.)

Q. Do you undertake to say positively that you never had any

communication with Mr. Cavanah about giving an extension of time in which he should act for you?

A. Positive I never gave it to him.

Q. The subject was not mentioned to you?

A. Not that I remember of; no such thing as giving time.

Q. Did you not have any conversation with Cavanah on that subject?

A. Not about giving time.

Q. What was the conversation about?

A. I asked him if he was going to Wood River; he said yes. I asked him if he would do me a favor. I told him that Winters said that Ganahl said that Wall would get that money or bank security, and I told him they had lied about it, and asked him to do me
258 the favor to find out; he said yes. That was the first conversation in my room. I thought maybe that he did not want to interfere or mix up, but that is the conversation with Cavanah, but as for me giving him any right to extend the time I did not.

Q. Was not the time mentioned?

A. I could not. My partner has $\frac{2}{3}$ to my $\frac{1}{3}$, and I knew that it could not be done.

Q. There was nothing said about it?

A. There might have been something said, but I never gave it to him.

Q. There was, then, something said about an extension of time?

A. There might have been.

Q. Was there anything said about bank security?

A. I told him that Winters said that he had a letter from Ganahl that Wall was going to raise money or give bank security.

Q. Did you not tell Cavanah in that conversation that if some extension of time was necessary to give it for you?

A. I don't know how I could do that.

Q. You don't think so?

A. I know that I did not.

Q. The subject was not mentioned?

259 A. Not between Cavanah and me at that time or any other time.

Q. So Cavanah signed your name to that paper without any authority or intimation whatever?

A. Most certainly he did without any authority from me.

Q. Up to the time you left for Rocky Bar, in January, '84, what had been the relations between you and Gen. Winters—were they friendly?

A. We were on speaking terms. I had no faith in him.

Q. From what date?

A. For some time back.

Q. How far back?

A. I don't know as I could tell.

Q. Give us the date.

A. I could not give the positive date.

Q. Approximately.

A. During the summer some time.
Q. What summer?
A. '83.
Q. Up to that time you had been friendly and had confidence in him?
A. When I first got acquainted with him, for a little while.
Q. When did you first get acquainted with him?
A. In '82, when he came over to Rocky Bar.
260 Q. You was friendly with him when you made the contract?
A. I did not know anything about the man. He was a stranger.
Q. You never had any confidence in him?
A. I did not say that. I did when I first got acquainted with him.
Q. Did you not meet him before you met him in Rocky Bar?
A. I met him in Hailey; was introduced to him.
Q. Did you tell him anything about the mine at that time?
A. I don't know. We generally talked about mines wherever I went.
Q. Did you not tell him the mine could be bought?
A. I might. Anything I have got a man can buy.
Q. Did you not request him and Ganahl to come to Rocky Bar?
A. I don't remember.
Q. To see if they could buy the mine?
A. I don't remember that I did. I invited men very frequently to come and see me. I might have done so, especially if they asked me about the mine. I have invited a good many men there.
Q. Did they ask you about the mine when you met them in Rocky Bar?
261 A. I expect likely that they did. I was then in my room. They might have done so.
Q. Have you got a good memory?
A. Sometimes I have. I remember anything that is of importance.
Q. You have had intimate relations with these men for a long time back. If you remember anything you ought to remember what has occurred.
A. Very little between them and me. I left everything to Mr. Settle.
Q. Do you swear that anything was said by you to them in Rocky Bar?
A. I think likely there was. I cannot remember the words. They might have asked me what kind of a mine it was.
Q. I want you to repeat the conversation.
A. I don't know as there was any general conversation between us. I took very little interest. They did not come to make any bargain with me. I left everything to Mr. Settle. I was in my room; everything was left with him to see that the papers were drawn up all right.
Q. Did you not request them to come up and look at the property with a view of buying it, at Wood River?

A. I don't remember that there was any conversation at
262 Wood River, that I remember. I did not know anything about those fellows until he came to Rocky Bar, and word came in that somebody was coming to buy that mine. We might have spoken about it there, but don't remember. My impression is that they did not have anything to do with it until they came to the Bar.

Q. They came for the purpose of making that purchase?

A. I don't remember only what Settle told me.

Q. I want to know when you lost confidence in Winters.

A. It was during that summer some time.

Q. Then up to some time in the summer of '83 you did have confidence in him?

A. Yes, sir; I did not know much about him.

Q. After the summer of '83 were you not on quite intimate terms—friendly with him?

A. I was friendly.

Q. Did you not live in the same house with him?

A. Yes, sir.

Q. In the same room?

A. No, sir.

Q. Adjoining room?

A. No, sir; he was on the lower floor.

263 Q. Did you not use his office as your office?

A. No, sir.

Q. Did you make it your headquarters?

A. I don't know as I did; I went in there often.

Q. Were you not often in his room?

A. I was in it; yes.

Q. Did not Gen. Winters do your principal letter writing?

A. Yes; he wrote some letters.

Q. When?

A. During that summer.

Q. And fall?

A. Yes, sir.

Q. In January?

A. I think not; I think he was sick in January.

Q. So you trusted him to write letters for you?

A. Sometimes.

Q. And you frequented his office?

A. I was called in frequently.

Q. And associated with him on friendly terms daily in Rocky Bar?

A. I saw him daily; cannot say that I was with him.

Q. And still you lost confidence in him?

A. Yes; I lost confidence in the summer.

Q. What was the occasion of your losing confidence?

A. I did not think he was a square man.

264 Q. Why?

A. I don't know as I can say exactly why, but a person will form an opinion of a man.

A. Yes, sir.
Q. Were you in bed?
A. Most of the time.
Q. It was written in your room?
A. Yes, sir.
Q. By whom?
A. Ganahl.
Q. You saw him write it?
A. Yes, sir.
Q. Where was it signed?
A. Right there in the room.
Q. Where was the contract signed?
A. In that room.
Q. I wish you would tell all that was said at the time these papers were signed.
A. I don't know as I can state all.
Q. As near as you can, commencing at the beginning.
A. I remember Settle asked Ganahl about the lease, whether the papers were all right, whether we could rely on them, that he was the only lawyer around there. Ganahl said: "Most certainly. Do you suppose I would do anything wrong. My reputation and profession demand it. The papers are all right." There might have been something else said.
269 Q. I want you to state all that was said.
A. Settle asked him whether the workmen could hold the mine owners for work done under the lease. Ganahl said that they could not; then Ganahl said, "I will draw you a paper and we will all sign it," and it was then signed.
Q. Was there anything else said?
A. They were talking about the time. There was a conversation going on, but don't remember what else was said. I think that was about the whole of it.
Q. That is all you can remember?
A. They repeated that several times, about the same thing. Ganahl seemed to be pretty positive that it was not necessary to have it; that the hands could not hold under the lease; that it was not like a deed.
Q. This was a lease?
A. That is the way I understood it. They had the privilege of buying at the end of one year; if they did not get the money out and could not get it outside they could buy it.
Q. A lease with the option of buying the mine—the proceeds were to be paid on the mine?
A. To be paid as a royalty, provided they did not take the
270 mine.
Q. You heard the contract read?
A. Yes; and read it.
Q. Before you signed it?
A. Yes, sir.
Q. The mine had previously been leased at ¼ the proceeds?
A. Yes, sir.

Q. Why did these parties agree to pay one-half?

A. We thought if a man had an option to buy that it was the best lease. We could lease it that way any time much quicker than the other.

Q. They agreed to pay one-half because that one-half could be applied on the purchase-money?

(Objected to as calling for a conclusion; objection sustained.)

Q. You said yesterday that you never heard before you heard it here of these parties purchasing the property. Is that what you mean?

A. That is not the way I said it. The first I heard that they claimed they were paying it as purchase-money.

Q. You never heard it before you heard it here?

A. No, not like that.

Q. That they claimed that the proceeds were paid as purchase-money?

A. I always understood that it was paid as royalty—that
271 is, the first I heard of it was when Winters swore to it, because I should not have signed the lease if I had mistrusted anything like that.

Q. You did not know that they were to take possession as purchasers until Winters swore to it here?

A. Not the way he swore to it.

Q. Who was present in December, '83, when you say you told Winters that Settle would not give any further time?

A. I don't think there was anybody present at that time.

Q. Where was it?

A. I don't know whether it was in the office or in his room; I think in his room.

Q. Anybody present?

A. Not that I know of; there might have been, but I don't remember that there was.

(Redirect examination:)

Q. Where was Winters' room at that time in Rocky Bar?

A. On the first floor in the front room of the hotel. Some call it the Reeser Hotel.

Q. How many rooms did he have there?

A. He had a sleeping room and office.

272 Q. What part of the hotel did he occupy as an office?

A. They call it the parlor; he had a bed-room off from that. There is another parlor.

Q. He occupied the parlor as his office?

A. Yes, sir.

Q. Was it occupied as a parlor to some extent?

A. Yes, sir.

Q. Was it a sort of a public room of the hotel?

A. You might not call it a private room. It was used by guests.

Q. It was a common parlor of the hotel?

A. Yes, sir.

Q. Did you write any letters to Gen. Winters in Dec., '83?
A. I don't know; I think likely I did.
Q. Where were you about the 14th of Dec., '83?
A. Here; in Boise City.
Q. Did you write any letters from Boise City to Gen. Winters at Rocky Bar in December, '83?
A. I promised to write from Wood River.
Q. Answer the question.
A. I think likely I did.
Q. Did you not promise Gen. Winters to keep a watch on Settle here in Boise City and inform him of what Settle was doing or intended to do, in December?
A. Not in that way; I will tell you what I promised to do. (Counsel shows paper to witness.)
Q. Is that your signature?
A. Yes, sir.
Q. Did you write that letter?
A. Yes, sir.
Q. What time in December where you here in Boise City?
A. I think I got here on the 26th of November and left
265 on the 17th or 18th of December.
Q. You say you wrote this letter?
A. Yes; I think I did. It is my signature.

(Counsel asks the court to mark the letter for future identity. Letter is marked "B.")

Q. In December, '83, you had no confidence in this man Winters?
A. I was doing business with him, but I cannot say that I had confidence in him.
Q. Were you not writing confidential letters to him?
A. I did it under promise.
Q. You had no confidence in him as a man?
A. No, sir; I did not.
Q. When you left Rocky Bar, on the 21st of January, for Boise City?
(WITNESS:) I left on the 23rd or 24th.
Q. Did you not see Gen. Winters just before you left?
A. It was the day before.
Q. And shake hands with him?
A. There was no shaking hands.
Q. The conversation you testify to was before you left?
A. The day before.
Q. The day you left did you not see him?
A. I don't remember that I did. I told him that would be
266 the last time that we would ever speak together.
Q. Did you not speak to him the night you left?
A. I don't think I did.
Q. Will you swear that you did not?
A. I don't remember that I did; don't think I did.
Q. If you had would you not remember?

A. I should think so. I remember speaking to him the day before.

Q. I ask you now if you did not go to him and shake hands with him and bid him good-bye?

A. No, sir; I think not. I think I would remember it if I did not. I say that I don't think I did.

Q. Was it not at this last interview with Winters when you bid him good-bye that you promised to write him?

A. No, sir.

Q. Did you not promise to write him?

A. No, sir; certainly not. I came down for an injunction.

Q. Did you not promise Gen. Winters to write him from Boise City as to Settle's intentions at the time?

A. No, sir.

(JOHNSON): Which time do you mean?

(SUTHERLAND): The 23rd of January.

(WITNESS): No, sir.

Q. Did you ever say you would write as to Settle's intentions?

267 A. No, sir. I knew what Settle's intentions were because he told me.

Q. Did you not promise to write him from Boise City to that effect in January?

A. No, sir.

Q. Do you remember meeting Mr. Vineyard here early in Feb'y, '84, after the commencement of this suit?

A. Yes, I remember that.

Q. Did you have a conversation with him?

A. I talked with him. Don't remember what the conversation was.

Q. Did you not tell Vineyard you found it impossible to stop Settle?

(WITNESS:) Do you mean the lawsuit?

(SUTHERLAND:) Yes, sir.

A. I could not tell him that.

Q. Answer the question.

A. No, sir; I told him nothing of the sort.

Q. Did you at any time?

A. No, sir.

Q. You were present when Exhibit A was executed—the contract—what you call a lease?

A. Yes, sir; I saw it when I signed it.

Q. Who were present?

A. Winkelbach, Ganahl, Winters, and myself, Settle, and Sol. Newcomer.

Q. Were you also present when Exhibit "B" was executed?

268 This is the paper, with reference to liens on the mines—what you call a waiver.

A. Yes; I was in the room.

Q. Where you was lying sick?

Q. Were any of the other guests of the hotel in the habit of going in the room?

A. Yes, sir; frequently. Very often the room is occupied alongside of him.

Q. You was stopping at the hotel?

A. Yes, sir.

Q. You was in Boise City in January. Where did you come from?

A. From Hailey.

Q. What led to your writing a letter to Mr. Winters?

A. When we gave them this 30 days' extension, Anderson acted for Settle. Anderson said that he had no right to do it, but tried to have him consent, and I promised to use my influence
273 when I came to Boise City to keep Settle down and have him consent to it.

Q. For what?

A. Signing the extension from the 27th of November to the 27th of December.

Q. What, if anything, was you afraid Settle would raise hell about?

(Objected to, as the latter has not as yet been offered in evidence. Objection sustained.)

(Recross-examination:)

Q. Did you agree to give Mr. Settle $4,700 for negotiating this contract, which you call a lease, with the defendants?

A. No; not $4,700.

Q. Did you agree to give Mr. Settle $4,700, or any sum of money whatever, over and above his two-thirds for negotiating this contract, which you call a lease, between Settle and Reeser and Winters, Ganahl and Winkelbach?

A. No, sir; not for that purpose.

Q. Did you agree to give him any sum over and above your $\frac{1}{3}$ for negotiating the contract?

A. No, sir.

Q. Did you not so state to Gen. Winters?

A. No, sir.

Q. Not at any time?

274 A. No, sir; I did not hire Settle to make that bargain.

Q. Did you not state to Winters that you gave this sum to Settle for throwing in that engine mentioned in the contract and negotiating this contract?

A. No, sir.

Q. The engine I refer to is the engine known as the Idaho engine.

A. No, sir; I did not.

Q. You did not make any such statement?

A. No, sir.

Redirect examination:

Q. In case of selling the mine for $40,000, how much was you to receive?

A. $12,000.
Q. What was the other $1,333.33—where was that to go?
A. Go to Settle.
Q. What for?
A. For the King that he claimed. It was a mill site.
Q. For the premises mentioned in the lease that you did not have an interest in?
A. Yes, sir.
Q. Did you have an interest in the engine?
A. I did not.

275 *Testimony of Thomas Nicholson.*

THOMAS NICHOLSON, being duly sworn on part of pl'ffs, testifies as follows:

Q. Where do you reside?
A. At Rocky Bar.
Q. How long have you resided there?
A. I believe it will be nine years in the spring.
Q. What is your occupation?
A. Mining since I came to this country.
Q. Do you know the properties, the Vishun and Idaho mines?
A. Yes; I have worked in them, off and on, ever since I have been in that country.
Q. How much have you worked in the mine—how often?
A. I could not say exactly, but worked in them about two years or, I think, it was on a lease. We had the mine for a year and then worked it for 17 months, I think.
Q. What year?
A. That was in '78 or '9, I think.
Q. Who was with you?
A. There was four or five of us. Thomas Mullaly, Fitzwater, and my brother James. There was another party named Peyton, but he did not work but a little while.
Q. You think your lease expired in '79?
A. Yes; I think it was in '79.
Q. After that, did you work in the mine any?
276 A. Yes, sir; I worked in it for Kitto and Parkason during their lease.
Q. Up to what time?
A. Until Gen. Winters took possession. I still worked on while Gen. Winters was working the mine—most of the winter.
Q. What was you doing for Kitto?
A. I was stoping most of the time. (Witness is here shown the map of the mines and points out where he was working at the time Kitto & Co. sold out—the Montana tunnel—where ore bodies were to be seen at the time Kitto & Co. sold out. One body, 60 feet long, that would go $50 or $60, and drift on ledge 625 feet run by Winters.)
Q. How much sunk in winze, etc.?
A. We measured 62 feet.

Q. What particular part of this work was done by Winters—on what level?

A. On the second level.

Q. The mine is winzed from 2nd to 3rd level?

A. Yes, sir.

Q. When did you make that measurement?

A. I think it was December—about the middle.

(The COURT:) The measurement from which the map was made?

277 (WITNESS:) Yes, sir.

Q. What examination did you make of mine at that time?

A. None particularly; only went through all the stopes and drifts, except these cross-drifts here (referring to map).

Q. Was there any indications why these cross-drifts were run?

A. No, sir.

Q. Did you see any on the other side of the tunnel?

A. No, sir.

Q. How often had you been in that mine since Winters stopped work there?

A. I worked there about two weeks since Gen. Winters stopped work.

Q. What is the condition of the mine as to ore now compared with what it was when Gen. Winters went into possession?

A. There is not as much ore in sight at present as there was; there is ore underneath, but none in sight to speak of.

Q. Is the ore overhand stoping?

A. But very little as far as developed.

Q. What is necessary to get the ore in the bottom of the drifts in a miner-like manner?

A. You would have to run drifts from the bottom of the

278 shafts from the lower levels.

Q. Can the ore be advantageously taken out by underhand stoping?

A. Not very handy.

Q. How much ore is there apparently now open in the mine to be got out by overhand stoping?

A. A very little; it has been stoped there; there is a few places that there is some ore, but it is very small.

Q. What will be necessary in order to get this ore in the bottom of these drifts?

A. You would have to extend that level (shows on the map)—you would have to run levels under.

Q. Do you know anything about contract work in Rocky Bar?

A. Not but very little.

Q. Have you been engaged in running tunnels and drifts by the foot?

A. Not at Rocky Bar. I did at Bonaparte. I took the contract there.

Q. Have you stoped by the foot?

A. No, sir.

Q. Do you know the ordinary price for running levels?

A. Yes, sir; generally contract from 6 to 7 or $8.00 per running foot; some ground as high as $8 to $10.00.

279 Q. What is the character of this ground where you worked?

A. Free ore; at this point it is very good ground (referring to map).

Q. Do you mean easy ground?

A. Yes; easy work.

Q. Do you know what it is worth per foot to run that tunnel and timber it?

A. I suppose it is worth seven or eight dollars.

Q. How about the other tunnel?

A. That is about the same; there was a block for a short distance, but most of it is very good ground.

Q. Does that include the timbering?

A. Yes, sir; we had a contract at Bonaparte for $7.50 for mining and timbering, but it was a very large tunnel.

Q. Is Bonaparte in that vicinity?

A. Six or seven miles.

Q. What is it worth per foot to sink a winze in that mine, sinking and timbering?

A. It is timbered and stulls in towards the bottom sufficient to hold up the ground.

Q. What is it worth per foot?

A. To sink would be ten or twelve dollars; to raise it would not be worth over seven or eight dollars.

Q. How was that done?

280 A. I think the principal part of it was raised. I do not know.

Q. You worked in those stopes?

A. Yes, sir.

Q. How much is that stoping worth per foot?

A. I don't know; I never contracted any, but I have heard others speak about what it is worth.

Q. What is the ordinary price at Rocky Bar?

A. I have not heard of any contract being let for stoping for several years. They used to contract at 75 cents. That was several years ago, before I came to the country. I have heard of contracts being made at 75 cents and making good, big wages at it.

Cross-examination:

Q. You worked for Kitto, did you?

A. Yes, sir.

Q. How long?

A. I commenced work for him in August, I believe, and worked until the 20th of November.

Q. Same year?

A. Yes, sir.

Q. Then you commenced work for Winters?

A. Yes, sir.

Q. How long?

281 A. From that time, I think, until the latter part of March or first of April, '83.

Q. You knew the body of ore which Kitto left when he quit?

A. Yes, sir.

Q. That ore was taken out by Winters?

A. Yes, sir.

Q. About how much ore did they take out of that?

A. I don't know exactly how much was taken out. It was up, I suppose, about 40 feet, as near as I can remember. I think that it was 20 to 25 feet that they stoped out.

Q. About how many tons?

A. I could not make any estimate.

Q. Was it over 60 tons, in your judgment?

A. Yes; I should think so.

Q. Do you think 100 tons?

A. I could not estimate it.

Q. How long was they in taking it out?

A. About a month.

Q. How many tons did they take out in a day?

A. I suppose two or three or four tons in a day.

Q. Did they take out as much as 4 tons every day?

A. I don't know as they did every day. It was about a 20-inch ledge—18 or 20 inch.

282 Q. They took it out in 30 days. If they took out 3 tons a day it would be 90 tons. Do you think it was that much?

A. Yes; I should think it was.

Q. When did you go into that mine to make these measurements?

A. I think it was in December some time.

Q. Was it about the 2nd of the last December?

A. I think somewhere about the middle.

Q. Who went in with you?

A. Riley, Fitzwater, and James Nicholson.

Q. How did you get in?

A. Through the Montana tunnel?

Q. Was it not closed?

A. Not at that time.

Q. Was it not locked?

A. No, sir; not when we went in.

Q. When you first went in?

A. That was when Mr. Settle started to work.

Q. When was that?

A. I think the 2nd of December.

Q. Did you go then?

A. Yes; I went in at the same time.

Q. Did Settle go in?

A. Yes, sir.

Q. Reeser?

A. Yes, sir.

Q. Yourself?

283 A. Yes, sir; and the two Kelly boys, Fitzwater, and fellow named Donahoe, and James Nicholson.
Q. Was that tunnel locked at that time?
A. Yes, sir.
Q. Did you break it open?
A. Settle pulled the staples.
Q. Broke open the house at the mouth of the tunnel?
A. Yes; they drew the staples.
Q. Since that time you have been in the employ of Settle?
A. Yes, sir.
Q. That was the way you got in?
A. Yes, sir.

Testimony of James Nicholson.

JAMES NICHOLSON, being duly sworn in behalf of pl'ffs, testifies as follows:

Q. Where do you reside?
A. Rocky Bar, Idaho.
Q. How long have you resided there?
A. Since '75.
Q. What is your occupation?
A. I have been in several occupations since being there. I was a miner first, then postmaster.
Q. What are you doing now?
A. Last year I was engaged in ranching.
Q. How much experience have you had as a quartz miner?
A. About three years, I should judge.
284 Q. Where?
A. Rocky Bar.
Q. In what mine?
A. The Confederate Star, Idaho, and Vishnu.
Q. How much in the Idaho and Vishnu?
A. I have done the principal work that I have done in those mines.
Q. Who did you work for first?
A. I worked the Vishnu mine under a lease.
Q. Same lease spoken of by your brother, the last witness?
A. Yes, sir.
Q. In what year did that lease expire?
A. I should judge it was '79; am not sure; that is my recollection.
Q. How long did you work under it?
A. I don't recollect how long we had the lease for; cannot recollect for what term the lease was taken. I think we worked it a while after the expiration of the lease.
Q. Have you worked in the mine since?
A. Yes; I worked in the mine two weeks this last December.
Q. Did you work any before that since the expiration of the lease?
A. No, sir; not that lease. I have had two leases before the lease of '79.

Q. When were you in the mine last before you went in there in December?

285 A. I don't recollect being in the mine since '79, at the expiration of our last lease, until December. I might have been in the mine when Kitto had it, but don't recollect.

Q. You made no examination while Kitto had it?

A. No, sir.

Q. Have you gone through the mine since Winters stopped work?

A. Yes, sir.

Q. Did you assist in making these measurements that your brother speaks about?

A. Yes, sir. (Witness here explains the map to the court.)

Q. How much ore subject to overhand stoping is there in the mine without running any more drifts?

A. There is very little. The stopes in some places would be 5 or 6 inches, and there now. It is what I consider worked out.

Q. What is necessary to work the ore further at a profit?

A. These drifts should be run to get under it.

Q. You have had three leases on that mine. What sort of a lease were they? Were they cash or royalty leases?

A. Royalty.

286 Q. A naked lease, without any option. What is a fair royalty to give for working that mine?

A. I have always considered that one-third was fair.

Q. What is the character of the ore? Is it base or free milling?

A. It is free milling.

Q. Is it gold or silver bullion?

A. Gold.

Q. You say about one-third of the proceeds as a royalty of a naked lease. What would be a fair royalty with an option to purchase at a fair price?

A. I don't know as I would be prepared to say.

Q. What is the object of an option to purchase?

A. I could not say. Of course, it is an object; don't know as to what extent.

Cross-examination:

Q. You had three leases on the Vishnu and Idaho mines?

A. Yes, sir.

Q. That is, you were concerned or interested in those leases?

A. Yes; I was a party.

Q. The last one was in '79?

A. '78 or '79.

Q. What was the royalty on that lease?

287 A. We was to give one-third.

Q. What on the lease before that?

A. I had two leases before. I had one-third interest. There was another party leased of Mr. Settle and I leased Mr. Reeser's interest.

Q. What was the royalty on that?

A. I contracted to give Mr. Reeser one-half of the gross proceeds.

Q. Was that the second lease?

A. Yes, sir.
Q. There was a lease before that?
A. The lease before that was also Mr. Reeser's interest.
Q. Simply Mr. Reeser's?
A. Yes; I gave him one-third that time.
Q. Did you make anything on that lease in '79?
A. No, sir.
Q. You found that you could not make any money on that lease by paying a royalty of one-third?
A. We run 400 feet through country rock before we got to the ledge. Then we only had a few feet.
Q. You came out in debt?
A. Yes, sir.
Q. Still in debt on that lease?
A. Not to my knowledge.
Q. Do you owe Mr. Winkelbach a grub bill of $250?
A. Not to my knowledge.
288 Q. Don't your brother?
A. Not to my knowledge.
Q. You came out in debt?
A. We did not make wages. What I mean by coming out in debt, that we did not make wages. We was in debt when we quit work, and when we crushed the rock we paid our indebtedness.

Testimony of Sol. Newcomer.

SOL. NEWCOMER, being duly sworn in behalf of the pl'ffs, testifies as follows:

Q. Where do you reside?
A. Rocky Bar.
Q. How long have you resided there?
A. Since '68.
Q. Are you acquainted with the parties to this action?
A. I am.
Q. Were you present in September, '82, when Settle and Reeser executed a lease or agreement between themselves and Winkelbach, Winters, and Ganahl, the defendants, in a mining transaction?
A. Yes, sir.
Q. Where was it?
A. It was in the Alturas Hotel—Mr. Reeser's room.
Q. Who was present?
289 A. Settle, Reeser, Gen. Winters, Ganahl, and Winkelbach.
Q. About what time in '82?
A. In September, '82; the date I don't remember.
Q. Did you do anything with that instrument?
A. They took the acknowledgement before me.
Q. Did you witness it?
A. Yes, sir.
Q. State as near as you can, using the words of the parties, the conversation that took place there at that time about the lease and supplemental agreement—what Reeser calls a waiver?

A. Along in the evening, about dusk, Mr. Ganahl came after me to come up and bring my seal to Reeser's room at a certain time. About the time I took my seal and went up there. When I got in there I found all these parties there—Mr. Ganahl, Winkelbach, Winters, Settle, and Reeser. I went in and sat down, and I think Mr. Ganahl then took up the instrument and commenced reading it. He cautioned them to be very attentive; that he did not want to read it over but once. He read it over in my presence very carefully, and after he got through, if I remember right, Mr. Settle
290 spoke up and asked him whether he could see anything wrong; that he depended a great deal upon Ganahl; that it would be an article that would protect both sides as much as possible. It is my impression that Ganahl told him that it was an instrument drawn up as near right as he could draw one. Then there was a conversation arose by Settle; something in case at the expiration of the time of the instrument for the time they were to have it, in case the mine was not paid for and should come back on their hands, if any indebtedness that might be against the mine for labor—whether there could be any claims or liens against the property for labor or any indebtedness against the mine. It is my impression that Mr. Ganahl told him that they could not hold the property for labor as against the original owners. They then agreed on the article—this paper called the waiver—that was talked of then; that they would draw an instrument, to be placed in Winkelbach's store, and have the men that was employed in the mine sign that instrument to show they held responsible just those parties that
291 employed them; that was my understanding, that the instrument was for that purpose.

(Shows paper to witness.)

Q. Is that your signature?

(Witness identifies the paper and the signature of the signers.)

Q. Where was that drawn?

A. I would not swear that that is the paper, but one just like it was drawn in the office. My impression is that that is the one.

Q. In Reeser's room?

A. Yes, sir; whether that is the one or not I would not swear to, but there was one written there that night.

Q. Did you ever witness more than one?

A. That is all. If that is not the one there was one drawn from it. I only witnessed one.

Q. Do you remember any more conversation between the parties about the lease?

A. I don't know as I do. I did not stay very long. Just as quick as it was drawn they signed it and I acknowledged it and left.

Not cross-examined.

Def'ts' counsel now desire to ask Capt. Settle a question; there being no objection, he is shown a paper and asked, "Is that your signature?"

292 A. It looks like it.

Plaintiffs rest.

Testimony in Rebuttal.

Defendants desire to introduce the affidavit of George F. Settle, dated Sept. 29th, '77, made in case of Thomas L. Johnston against George F. Settle and Jacob Reeser, then pending in the district court for Alturas county, Idaho Territory.

A copy of said affidavit is hereto attached and made a part hereof.

Plaintiffs, by their counsel, object as being incompetent and irrelevant.

(The COURT:) The question in this case seems to be whether the contract, or whatever it may be called, shall be called forfeited and the plaintiffs entitled to possession or whether the other parties shall be allowed to pay the balance due on the mine and be entitled to a deed. As I understand it, these are the only questions we are trying in this case. It is conceded by both parties that the mine before this contract was made more than paid expenses, the witnesses differing from $\frac{1}{8}$ to $\frac{1}{3}$; that it more than paid expenses when the other lease expired, and it does not seem to be important what it
293 was worth before that. I do not see how this will aid me in determining the matter. I do not think it competent.

Exception for defendants.

Defendants, by their counsel, now offer in evidence the letter from Settle to Ganahl, dated July 31, '82, which was marked "A" by the court for identification. Letter is admitted in evidence and marked Exhibit "F." Said letter stated in substance that the property, referring to the Idaho and Vishnu mines, was under bonds or leased or both, and if he (Settle) could make arrangements with lessees or parties to whom bonded he would then entertain his (Ganahl's) proposition to purchase the same, and also referred Ganahl to the records in the recorder's office of Alturas county, at Hailey, for the condition of his, Settle's, title to the property.

Testimony of John B. Winters (Recalled).

JOHN B. WINTERS, being called in rebuttal, testifies as follows:

Q. I call your attention to a conversation in Rocky Bar between the defendants and plaintiffs in negotiating the contract in question. Commence at the opening of that subject and relate that con-
294 versation, *pro* and *con.*, to the execution of the instrument.

A. When I arrived at Rocky Bar I knew Mr. Reeser, having met and been introduced to him at Wood River and spent a good deal of time with him. Mr. Ganahl came there a few days after. He was desirous of selling when at Wood River and induced me to go over there, and I afterwards went over to the Bar.

Q. State when the conversation with them was and what was said.

A. That was my first conversation with Reeser, when I went there.

Q. Where?

A. Rocky Bar.

Q. What was said then?

A. He was desirous of selling the mine. I was waiting for Ganahl. I had a conversation with Winkelbach, which was the greater inducement for me to go to Rocky Bar. I really had more talk with him at Wood River about the mine than I had with Reeser.

Q. Had you made an appointment with either of them to go to Rocky Bar?

295 A. I had promised both of them to go over. I went by stage and Ganahl and Winkelbach went by private conveyance.

Q. Where was the subject opened after your arrival?

A. The negotiations were carried on by Ganahl and Settle. I have no recollection of being present, but had my impression from Ganahl until the agreement or contract had been agreed upon by Ganahl and Settle. We were there in the Newcomer Hotel.

Q. Who was present?

A. I cannot recall now. I think Mr. Ganahl and myself only at that time. I told them it was a pretty high figure. Our next meeting was with Settle, Reeser, Winkelbach, and Ganahl before executing the paper in Reeser's room.

Q. Was that the meeting which included the signing of the instrument?

A. That is my recollection.

Q. Did you go with anybody; if so, who?

A. I cannot say whether we went together or separately. All were in Reeser's room together.

Q. What was said and done?

(Objected to, as witness has already gone over that matter in his first examination. Objection overruled.)

296 A. Mr. Winkelbach objected to the price, turned to Settle, and asked what his idea was in raising the price ten or twelve thousand dollars. Settle replied: "This is a different contract. My former bonds have been on a cash basis. This gives you men an op-ortunity to dig it out of the mine. It is different from my former bonds, and you can work it or let it alone. You are not compelled to work it." That is about all.

Q. Any conversation occur to you between Settle and Ganahl as to the contract accomplishing certain purposes—whether persons working in the mines could do certain things?

A. There was not a word of that kind passed, to my recollection. It seems to me that I would remember a portion of it, at least, if it had occurred.

Q. Have you stated all the conversation that you can now recall?

A. Yes, sir.

Q. Was the contract read?

A. Yes, sir.

Q. By whom?
A. Ganahl.
Q. To whom?
A. Settle, Reeser, Winkelbach, and myself. I don't remember whether Newcomer was present at the reading. I think he was.
297
Q. When was this supplemental agreement written?
A. That I cannot say. My recollection of that is that it was written the following day and executed. I cannot say positively, but it runs in my mind that it was not written that day. I think it was written the following day, although I may be in error, but have no recollection of its having been written that evening.
Q. You don't recall anything now?
A. No, sir.
Q. Did you hear the testimony of Capt. Settle yesterday?
A. Yes, sir.
Q. Are you particularly familiar with the Montana tunnel?
A. Yes, sir.
Q. Can you call to mind a point between 150 and 200 feet from the mouth referred to by him, where there was two ore bodies?
A. I have not discovered an ore body as big as my fist. There is a shaft there that is filled with water impossible to get through.
Q. Do you say there is no such opening?
A. There is an opening to the west. Possibly there may be a body of quartz, but not in sight.
298
Q. Is there any such opening in that map?
A. No, sir; it is not marked.
Q. Can you understand from Settle's description where the 4th body was situated?
A. No, sir; I cannot.
Q. At the face of the Fitzwater works the previous year?
A. There was no ore there when I went there and none to-day. That part was worked out.
Q. Then you did not enter?
A. Just as far as I could. The works are badly caved. The east face is where we started this cross-cut for 5 or 6 feet and struck this body of ore.
Q. You have been to the face of those works?
A. Yes, sir.
Q. Is there any ore in place?
A. No, sir; there was no ore but discovered by that cross-cut.
Q. What is the usual width of a tunnel?
A. About 5 or 6 feet in the clear.
Q. What highth?
A. Six feet between track and cap.
Q. What is the character of the rock at those stopes?
A. Porphyry, granite at about the average of the rock of that country. It is drilling and blasting rock. To get the ore streak out requires blasting. The ore in that mine is peculiar. We find it what we call "frozen" to the foot wall, which requires drilling and blasting.
299

Q. What are the materials necessary to work the mine?

A. Steel, candles, iron, charcoal, fuse caps; those are the principal ones.

Q. In this work under the contract what besides this was the expenses of working it?

A. No additional expense, except the purchase of the Kitto lease and some improvements made there, hauling and milling the ore.

Q. How much for hauling?

A. $1.25.

Q. How much for milling?

A. We paid a royalty for the use of the mill of one dollar per ton. Our additional expense was about $3.00 per ton.

Q. How much for transportation of bullion?

A. It was $15.00 per thousand to San Francisco.

Q. Was there any expense in San Francisco?

(Objected to as not proper rebuttal; overruled.)

Question repeated.

300 A. The mint charges and for what currency we got back, I think, $10.00 per thousand—I mean $5.00 for each lot.

Q. I will call your attention to the statement made by Mr. Reeser that when he returned from Boise City, in December, he informed you that Mr. Settle would not give any time after the 27th. I ask you now what your recollection is of any such conversation?

(Objected to, as that conversation was given in witness'*es* first examination, on page 42 of the transcript. Objection overruled.)

A. There was no such conversation.

Q I ask you generally whether in December you was informed by Reeser at any time that such was Mr. Settle's instructions?

A. I was not.

Q. I call your attention to what Reeser testified to as having occurred the night before he left for Boise City, in January, the 23rd or 24th. State what the facts are in respect to your saying that you had six months' time on him through Cavanah, and whether a conversation ensued in which Reeser said that if you said that

301 you was a liar and a son of a bitch, and that after that there should be no conversation between you.

A. He did not call me those names.

Q. State whether there was any angry altercation between you.

A. None whatever.

Q. I will ask you whether before he went away in the morning he did not come and bid you a friendly good-bye the next morning, or whenever he was about to start?

A. He came in the next morning about daylight and had some little ropes tied around his waist. I asked him what he was going to do with them. He said he used them for toggles in climbing the hills. He said, I want to bid you good-bye, and I hope you will be all right in a few days, and I will write you as soon as I get to Boise. That was our last interview.

Q. State whether Mr. Settle told you, in the course of that conversation, that he had not been in the mine in ten years.

A. That is what he told me prior to the signing of that paper—some two or three days before.

Q. Who was present?

302 A. I think Mr. Ganahl was present. It was quite a general talk.

Q. State how valuable ore must be in that mine to be pay ore. How much must it yield?

(Objected to as not being proper rebuttal, having been gone over in the examination-in-chief. Objection overruled.)

A. That is a difficult question to answer. As the mine is standing to-day, I should think the milling and mining for $15.00. There is no heavy work to do. In the past milling and mining has cost us over $25.00. At present, $15.00 would be at a profit.

Q. I wish now to call your attention to Mr. Reeser's denial that he ever told you that he agreed to pay Settle $4,000 or some other sum, more than two-thirds, for negotiating this contract and putting in the Idaho engine. Now, I ask you whether Mr. Reeser ever made such a statement to you.

(Objected to on the ground that that question was asked Mr. Reeser on cross-examination, and that def'ts are bound by his answer, and that it is immaterial to this issue. Objection overruled.)

A. He did.

303 Q. State whether at the time this contract was executed there was any professional relation between Ganahl and yourself.

A. Yes, sir.

Q. What was it?

A. He had been my attorney, and was and still is, in a case I had at Wood River.

Q. Do you know anything about Mr. Ganahl's professional relation with Mr. Winkelbach?

A. Not at that time.

Cross-examination:

Q. The lease was signed in Reeser's room?

A. Yes, sir.

Q. Was it delivered to the defendants in that room?

A. That is my recollection.

Q. That night?

A. Yes, sir.

Q. Who took it?

A. My recollection is that Ganahl took it and had a copy made. I saw Newcomer the following morning copying it. He told me that he employed Newcomer to copy it.

Q. It was delivered to defendants then?

A. Yes, sir.

Q. In pencil?

304 A. Mr. Newcomer was putting in his time in copying it in ink. I presume for the other parties.

Q. It was delivered to you that night?

A. That is my recollection. I am not clear on that.

Q. Do you remember anything being said about the subject-matter embraced in Exhibit "B?"

A. I cannot recall when that was executed, but I think not at that time.

Q. Was there any agreement when you was there together that you would execute it?

A. Yes, sir.

Q. This is dated the same day as the lease. You signed it, did you not?

A. Yes, sir.

Q. If it was not signed then it was afterwards?

A. There are two reasons why it was not signed then. Two signed in pencil and one in ink. I think the names in pencil were signed at different times.

Q. If there was no agreement about signing it, how did you come to sign this after the lease was delivered to you?

A. Mr. Ganahl told me he had agreed to give this to Settle.

Q. When?

305 A. I don't know; i- might have been at the time.

Q. If you signed a subsequent agreement drawn up in lead pencil, as though drawn in a hurry, apparently on a blank piece of paper, after the lease was drawn and after it was delivered to you, would you not be apt to remember that?

A. I would be very apt to follow the instructions of my attorney.

Q. Can you not recall whether you signed it afterwards or not?

A. I cannot.

Q. Would it not impress itself upon your mind?

A. It might have been signed at the time.

Q. Can you not recall the fact of signing it subsequently?

A. That is my impression.

Q. Can you recall when it was signed?

A. No, sir.

Q. Do you carry an indelible pencil in your pocket?

A. Yes, sir; I have carried one for the last five years.

Q. Was the lease signed in ink?

A. Yes, sir.

Q. Was there any ink in Reeser's room?

A. Undoubtedly.

306 Counsel asks witness to explain on the map as to which end of the stope is the highest.

Q. How often was you in the mine before January?

A. Almost daily. I was sick for a time.

Q. Have you examined that stope since you got well?

A. No, sir.

Q. Did you ever measure the stope?

A. No, sir; I am only giving it on my judgment.

Q. You think the west end of the stope was the highest when you saw it last?

A. I am wrong about that. It was the end towards the Montana tunnel; the easterly end was the highest.

Q. Is this correctly represented on the map?

A. Yes, sir.

Redirect examination:

Q. State whether at any time during the talk preceeding the execution of this contract if any thing was said by Mr. Settle about an interest being in Mr. Anderson, and having made any arrangement with him about it.

A. Never heard it—that Anderson made any arrangement
307 or had any interest. I cannot state when I learned it.

Q. Did you hear of it at the time this contract was made?

A. No, sir.

Q. You learned of it since?

A. Yes; a few days after.

Q. Have you ever had any conversation with Settle about Anderson's interest?

A. Not to my recollection.

Recross-examination:

Q. Did you not in July or along some time that summer, at Wood River, tell Settle, in speaking of Anderson's interest—did you not tell Settle you would make him pay $5,000 for it?

A. I did not.

Q. Anything to that effect?

A. Not that I recollect.

Q. Did you not shake that interest at him and say, "Damn you, I will make you pay $5,000 for that interest?"

A. No, sir.

Frank Ganahl Recalled.

FRANK GANAHL, being recalled in rebuttal, testifies as follows:

Q. You are the defendant Ganahl?

A. I am one of the defendants, sir.

Q. You are the Ganahl referred to as having drafted the contract?

A. The same person; yes, sir.

308 Q. Who negotiated the bargain that was reduced to writing?

(Objected to as having been gone over in the examination-in-chief of Gen. Winters. Objection overruled.)

A. Do you mean who did the actual negotiating? Winkelbach, Settle, and Winters. I had no conversation with Reeser except on the 19th of September.

Q. Did you meet at Rocky Bar by appointment?

A. In one sense, yes; and in another, no.

Q. I wish you to commence where the first interview took place between you and the plaintiffs or either of them and you and associates after you got to Rocky Bar?

A. I had other business there at the time, although this and this trip which resulted in the execution of this lease was one reason. I had an important case in the court, in which Thomas L. Johnston was a party. I had another suit there, in which this same party was interested; also Mr. Reed. Getting this mine was one object. I had correspondence with Settle on the subject. I approached Settle, and the first conversation I had with him was the one
309 that he details in Winkelbach's store, in which the substance was whether we could get the mine and have a chance to pay for it by working it, but the price was not stated then by him nor was there any application by me to give a bond for sixty days. The amount was not stated at that time. I asked him whether he consented to our getting the mine and paying for it by working it.

Q. By purchase or lease?

A. By purchase and paying for it out of the proceeds of it, whether he would take part of the net proceeds or take the gross proceeds, and what proportion. He replied, "One-half;" that was about the substance in Winkelbach's store.

Q. Did you agree as to price?

A. At that time? No, sir.

Q. Did the conversation which he relates take place then?

A. Portion of it—the substance of it; but no application was made for a sixty-day bond, but simply whether we could get the mine and pay for it out of the proceeds. He said one-half of the gross proceeds.

Q. He said your proposition was accepted?

310 A. No, sir; he did not set his price for the mine at that time. The next, Winters, Winkelbach, and myself and Settle met in Newcomer's Hotel in September, '82, prior to the 19th a day or two. Then the trade was spoken of. He was asked there by Winters and Winkelbach how much he asked for the mine. He said $40,000. Winkelbach was astonished at the price. He asked why he asked $40,000 from us when he had offered it for less. He said that that was a cash transaction, but this was not, and also the delay in the payment which would necessarily ensue until the payments were made. Then the subsequent matter of this subsequent lease was also discussed in that conversation, and one-half of the gross proceeds was discussed, the propriety of whether we should buy that lease or not—that is, the Kitto lease, which did not expire until the 27th of November. Settle said that there was no necessity of buying it. Winters said that unless we got to work immediately we would lose a whole season's work. The conversation was then about what we would have to pay for this
311 mine. I understood afterwards that the lease had been deposited with Warran P. Callahan by both parties. It was not a matter of record at that time, but it had been deposited for safe-keeping by both parties. Settle stated that there was no necessity of buying the lease. The amount as to what it would cost, he

said that he thought it could be bought for $3,000, and if we decided to buy it he would use his influence to buy it as cheap as possible, but I think $3,000 was the price he thought he could buy it for. I was directed then to prepare this paper with that in view.

Q. Let me ask you what, if anything, had been said to you about leasing the mine for a year?

A. Nothing said about a lease. The time given was a year in which we had to pay for it.

Q. I ask what, if anything, at the time you drafted the paper had been said by the parties about a lease for a year?

A. Nothing said about it for a year.

Q. Or any time?

A. No; not for any time.

Q. State what took place after that.

312 A. I went to my room in the hotel to prepare this document on slips of paper and submitted them to Settle and went over there. It took me the balance of that day and possibly the next day. The only point that he hung out so — was that clause with regard to manipulating the bullion. I had to rewrite it two or three times before I could get his idea. That was about giving receipts from the time the bullion was taken until the proceeds of the sales were received. I then engrossed the instrument, and we talked about the amount we was to pay for this lease, and whether we could raise the amount to pay for it. I finally wrote the instrument off in ink and read it to them. That was about two o'clock on the 19th, before dinner.

Q. What occurred after the preparation of the paper?

A. After the engrossment of the paper, Exhibit A, was prepared I read it over to Settle and left it with him. I saw him again that afternoon in the basement of Newcomer's Hotel, about 3 or 4 o'clock or little later. What he hung on was the dread or fear about a lien being put upon the mine and our inability to keep the

313 mine free from debt. He assured me that he had no fear from Winkelbach or myself and supposed Winters was all right; that in the event of our not succeeding with it that the mine might be gutted and left on his hands covered with liens. I assured him that our employees could not bind that mine for any greater amount than we had in the mine. He then told me about a decision that Judge Prickett had made. I got the statute and examined the lien law. That did not seem to satisfy him. I then went over to Winkelbach's store and had a talk with him and, I think, with Winters. This fact I don't know, but learned it subsequently. I understood that he had afterwards consulted Mr. Rollins, but I am satisfied about this. While I was in Winkelbach's store this idea flashed into my head, and I drew this instrument, Exhibit B. I drew it there and signed it in person. Winters then came in and signed it. The paper was taken over to Newcomer's Hotel. I said, "That is the best I can do, and I will get each and every one of our men to sign this agreement." (Witness here reads or repeats the wording of the agreement.)

314 (The COURT:) Was that before the delivery of the other instrument?

(WITNESS:) Yes, sir; that was signed, but we did not give that to him.

Q. What time do you refer to?

A. In the afternoon of the 19th and prior to the execution and delivery of this document, Exhibit A. This paper was drawn (witness has paper in his hand) at Winkelbach's store by me and signed by him and myself, and Winters signed it at that time with his indelible pencil. It was delivered at the time of Exhibit A, in Reeser's room, as part of it. That is my recollection. I desire to state that it was not drawn in Reeser's room. There was another instrument drawn at the same time for the use of Reeser's mill for a year. That was drawn in the room. Mr. Newcomer witnessed it at the time he witnessed the signature of Exhibit A.

Q. While you was discussing this clause that he had some anxiety about, state whether you said to him that you was entering as lessees and not as though you had entered as purchasers.

A. No, sir. I don't recollect of any such statement having been made.

315 Q. You may state whether Mr. Settle ever made a proposition to you to negotiate with you about leasing the property for a year.

A. No, sir.

Q. Did you conduct any negotiations with a view of obtaining a lease or wholly to make a bargain to purchase?

(Pl'ffs' counsel objects as to what their secret intentions were.)

(WITNESS:) This contract speaks for itself.

Q. Did you negotiate for a lease?

A. No, sir.

Q. Was there a conversation between you and plaintiff- or between plaintiffs and defendants, to your knowledge, with reference to any lease of the property?

A. No, sir.

Q. Have you stated all that took place prior to the delivery of the papers?

A. Yes; all the substance of it.

Q. I will ask you if Settle knew of your being attorney of Winters or Winkelbach.

A. Yes; he must have known it. I don't say he did, but he must have known it. I talked with him about the North Star case of Gen. Winters.

316 Not cross-examined.

John Winkelbach in Rebuttal.

JOHN WINKELBACH, being called in rebuttal, testifies as follows:

Q. Do you remember the conversation at your store between Settle and Mr. Ganahl about this property—about making a contract?

A. Yes, sir.

Q. Will you relate that conversation?

A. Ganahl did most of the talking. Ganahl asked him what terms he would give us on the Vishnu mine or sell it to us. They talked awhile and Settle made a proposition that he would let us have it for one-half to be paid out of the mine, out of the gross receipts, until the mine was paid for.

Q. Did you talk about the time?

A. He said it would be best to state a time, but that the time was not material as long as he would get his money. He did not state his price until we met afterwards, in Newcomer's.

Q. State whether, during this conversation, anything was said about his leasing the mines to defendants.

A. Nothing said about a lease. All the talk was about purchasing.

317 Q. When you met afterwards, at Newcomer's Hotel, state who was present.

A. Mr. Settle, Mr. Ganahl, I think Gen. Winters was there, and myself; would not be positive whether Winters was there or not.

Q. State that conversation.

A. He gave us his price. Says he, "If you will give me one-half the gross proceeds as the come-out of the mine until I get my $40,000 I want to get out of the mine. You give me $40,000." He agreed upon the price. When he said that I said, "How is this? You have held your mine cheaper than that." He said that was on a cash basis. You have a chance to get the money out of the mine.

Q. What further was said?

A. He said, "It is worth something to have a chance to make the price out of the property instead of paying the money right down." That is the substance of what he said.

Q. Did the parties agree upon the terms at that meeting?

A. Not that meeting. I told them that it was too much.

Q. You did not accept the proposition, then?

A. No, sir.

318 Q. Did you have another conversation with Settle before the terms were agreed to?

A. Yes; in my store. After this proposition was made I walked out and went to the store. Settle came up afterwards. We went into the back room of the store and remained there quite a while talking about it. I said that I thought it was too much. Says he, "You will have a chance to make it out of the mine, and it certainly ought to be worth more than if you paid the cash for it."

Q. What further was said then; did you come to any understanding?

A. I said that I would see Ganahl and Winters.

Q. Was anything said about a lease then?

A. Nothing said about a lease. He would not lease the property.

Q. When did you next meet?

A. Winters, Ganahl, and I had a talk and decided to take it upon those terms. We agreed for Ganahl to draw up the papers. We knew that Ganahl knew more about drawing up papers.

Q. Were you present when it was signed?

A. Yes, sir.

319 Q. Do you know where this paper was written in "Exhibit B?"

A. Yes, sir; that was drawn up in my store on my writing desk. He and I signed it then and Gen. Winters signed it afterwards.

Q. Where was the contract signed?

A. In Reeser's room, in the Alturas Hotel.

Q. Were you there?

A. Yes, sir.

Q. Did you hear all the conversation there?

A. Yes; I heard all the conversation. I might not recollect all of it. It seems that both parties were satisfied.

Q. What was said there about a lease?

A. There was nothing said about a lease that I can recollect.

Q. The contract was read?

A. Yes, sir; they requested Ganahl to read it; he read it slowly and carefully so everybody could understand it.

Q. Were you frequently in the mine during the time you and your associates were working it?

A. Yes; probably once a week; sometimes oftener.

Q. Do you know of any body of ore discoverable 150 — in from the mouth of the tunnel?

320 A. No, sir; I could not see any there.

Q. Did they take out any ore from that place?

A. No, sir; I do not think there was any taken out there.

Not cross-examined.

T. W. Rollins in Rebuttal.

TRUE W. ROLLINS, being called in rebuttal, testifies as follows.

Q. What is your business?

A. Manager for the Elmore Company.

Q. You have had some experience in the management and working of mines?

A. Yes, sir.

Q. Are you familiar with the property in question?

A. Yes; part of it.

Q. During what periods were you in the property?

A. In '77, the first time; then representing the owners of it; not the Vishnu, but the Montana tunnel with the two mines ahead.

Q. Have you been familiar with it since?

A. Yes, sir.

Q. Were you in during the time of the Kitto lease?

A. Yes, sir.

Q. Since the defendants ceased work?

A. Yes, sir; I think on the 12th of December.

321 Q. I wish to call your attention to the Montana tunnel and ask you what, if any, signs of ore there are at 150 or 200 feet in from the mouth of that tunnel.

A. There was seams of quartz along one comparatively barren ledge.

Q. State whether there is open to observation any pay ore that would mill $20.00 to the ton.

A. I think there is not at present, visible.

Q. Where?

A. Along the shaft west of the Montana tunnel, about 43rd tunnel.

Q. I am speaking now of 150 to 200 feet.

A. I had reference to the cross-cut.

Q. 150 to 200 feet in from the mouth of the Montana tunnel?

A. I don't know of any $20 rock there.

Q. Not worth as much as that?

A. No, sir.

Q. Any quartz at all?

A. Yes, sir; there is some show of ore. It is a rose-colored rock, from 18 inches to 2 feet. There was a stope worked for a short distance. It runs to the level above; that is caved in. I never measured it. It was worked in an arastra in '78, and, as far as I
322 can learn from the records, it went 10 to 12 dollars to the ton.

Q. What show of ore on the east side?

A. No opening.

Q. What show of ore in the side?

A. There was a seam of ore formation.

Q. Where did you reside in January, '84?

A. At Rocky Bar.

Q. State whether at the house where Gen. Winters and Reeser lived.

A. Yes, sir. Reeser was the proprietor of the house; rents it to Mr. Golder.

Q. Were you there personally?

A. Yes, sir; boarded there from the 23rd of May, '83, up to July, '84.

Q. Can you call to mind that month anything in connection with Gen. Winters and Mr. Reeser?

A. I call to mind that Reeser was sick during that winter.

Q. State, if you know, what were the personal relations between Reeser and Winters.

A. Seemed to be amicable. We made Gen. Winters' sort of a meeting room for all of us; saw Reeser there as many as six or seven times a day.

Q. Give us the degree of intimacy?

A. There seemed to be a great deal of cordiality between them up to the time of the service of some papers.

Q. Do you know of Reeser going away the latter part of January?

323 A. Yes, sir.

Q. Do you know the occasion of his going away?

A. I do not.

Q. Were you present when he went?

A. No, sir; he went early in the morning.

Q. Did you see him the day before?

A. The evening before.

Q. Did you see him in Gen. Winters' room?

A. Yes; he sat at the bedside.
Q. What was their interview?
A. They seemed to be in conversation when I stepped in the room. I said, "Excuse me, if you are in conversation I will step out." Gen. Winters said, yes; that they were busy; so I went out.
Q. Where were you during the interview?
A. In Judge Anderson's office, just opposite the hotel.
Q. Did you see these parties together after that at any time?
A. No, sir.
Q. Did you hear any intimation by either of them that there had been an angry interview between them?
A. No, sir; I did not; not at that time.

Cross-examination:

Q. What room was that in which you made a general meeting place?
324 A. The front room, on the west side of the hotel.
Q. What is his room?
A. A large sitting-room with two bed-rooms off from it.
Q. The sitting-room of the hotel?
A. The sitting room is on the east side. This is a private parlor that was to let for an office, with the two rooms. It was the general office for the Vishnu mine.
Q. Was that the exclusive use of it?
A. Gen. Winters occupied it for that purpose.
Q. Was there any other parlor in the hotel?
A. Yes; upstairs—the ladies' parlor.
Q. That is the room as you enter the hotel to the left, upstairs?
A. Yes, sir.

Both parties rest.
The foregoing is the whole of the evidence in the cause. The map referred to by the evidence is considered a part hereof.

325 *Deposition of F. P. Cavanah.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants.

Deposition of Frank P. Cavanah, taken under the annexed commission and in answer to the annexed interrogatories.

On the 19th day of September, A. D. 1884, at Villaldama, state of Neuva Leon, Republic of Mexico, Frank P. Cavanah, the above-named witness on the part of said defendants, personally appeared before the undersigned, James Baxter, commissioner, who adminis-

tered an oath to the said witness, Frank P. Cavanah, that the evidence he should give in said action in answer to said interrogatories hereto annexed should be the truth, the whole truth, and nothing but the truth. Whereupon the several direct and cross inter-
326 rogatories were read to said witness, and he, upon his oath aforesaid—and his answers were wholly written by the said commissioner—answered the same successively as follows:

1st question. What is your name, age, and occupation and where do you now reside?

Answer. My name is Frank P. Cavanah; my age is 51 years; my occupation is that of a mining engineer; I reside at Villaldama, state of Neuva Leon, Republic of Mexico.

2nd question. Where did you reside in December, 1883, and January, 1884?

Answer. I resided in Atlanta, Alturas county, Idaho Territory, until the 23rd day of December, 1883, when I left Atlanta aforesaid for Rocky Bar, Alturas county, Idaho Territory, and at the latter place for about three weeks, when I left Rocky Bar aforesaid for Hailey, Alturas county, Idaho Territory, and remained in Hailey aforesaid until the 24th day of January, 1884.

327 3rd question. Do you know the said plaintiffs and defendants or either and which of them, and how long and where have you known them?

Answer. I am well acquainted with all the parties to the above action; have known George F. Settle and Jacob Reeser, the plaintiffs, for about ten years; have known John B. Winters for about seven years, Frank Ganahl for about four years, and John Winkelbach for about ten years; was acquainted with all of the above parties in Idaho Territory.

4th Question. In 1883 or latter did you know of or have you any information, and, if so, what and how derived, relating to a contract between the parties to this action touching the Vishnu and Idaho and other mining claims and property situate in Bear Creek mining district, Alturas county, Idaho Territory?

Answer. During the year of A. D. 1883 the parties to this
328 action, or part of them, viz., Jacob Reeser, John Winkelbach, Frank Ganahl, and John B. Winters, frequently discussed the terms of a certain contract then existing between them; but I cannot remember now what the terms of such contract was, any more than I was then and am now under the impression and believe such contract to — had reference to the Vishnu and Idaho and other mining claims situate in Bear Creek mining district, Alturas county, Idaho Territory.

5th Question. State whether or not you was requested or authorized at any time, and, if so, when, by said plaintiffs or either and which of them to do any and what act or thing relating to said contract or the performance thereof, and what, if anything, and when, you did in performance of said request or authority. If you executed and delivered to either party any paper or writing, state the fact to whom it was delivered and the connection and circumstances

which took place at the time *at the time* of the giving of such authority and the making of said paper or writing; and, if you are able to do so, annex to your deposition, with proper reference, *to* said
329 paper or writing, and please state whether it is the original, and, if so, how it again came into your possession.

Answer. The only contract or paper or writing of which I have any knowledge was a paper drawn up by Frank Ganahl, Esq., being a provisional contract between Isidor Morris, John Winkelbach, John B. Winters, & Frank Ganahl, and which I executed for and in behalf of Jacob Reeser as his attorney-in-fact, and which contract is hereby appended as a part of this answer and marked Exhibit A; but at the time I executed such contract on behalf of and attorney-in-fact for Jacob Reeser I had some doubts as to the legality or expediency of such act. I was assured by Mr. Frank Ganahl, however, that the act was proper and legal and in conformity to the law. Under such assurance I executed the said contract in order, as I thought at the time, to promote and maintain a more friendly feeling between the parties in interest, all of whom being my personal friends.

The annexed contract to this answer and which is hereby
330 marked Exhibit A, is the original paper or contract as drawn up by Frank Ganahl and was forwarded to me from Idaho with other papers sent by the clerk of the court of the second judicial district for Idaho Territory, and which papers created the commission by which my evidence is now being taken by the commissioner so appointed.

6th Question. If you heard any conversation between said plaintiffs or either of them during the month of December, A. D. 1883, or January, A. D. 1884, relating to the said contract or the property covered by said contract, state the conversation fully and particularly.

Answer. I have often heard both the plaintiffs and defendants discuss the merits of the contract in question, but I cannot recall any particular point made by either party now. The discussion was always, according to my recollection, in reference to the subject-matter contained in the said contract; and, further, I never had one dollar interest, either directly or indirectly, whatever in the
331 property in question or with either of the plaintiffs or defendants. My office in the case was simply to promote and maintain a friendly and amicable feeling between all parties interested.

7th Question. Do you know any other matter or thing pertenent to the subject of the preceeding interrogatories? If so, state the same fully and in detail.

Answer. I know of nothing further that is pertenent to the case.

8th Question. State, if you know, whether either of the defendants—and, if either, which of them—in the month of January, 1884, offered to either of the plaintiffs—and, if so, to which of them—the endorsement of Col. E. A. Wall upon the promissory note of the defendants, payable in six months, for the balance the- due; and, if so,

what reply was made and by whom to such proposition. State fully all that was said in your hearing by either party.

332 Answer. The above matter was discussed between John B. Winters and Jacob Reeser, but I cannot now call to mind the proposition which the said John B. Winters stated to Jacob Reeser was made by Col. E. A. Wall.

FRANK P. CAVANAH.

I hereby certify that the foregoing deposition was taken at the time and place mentioned in the foregoing caption to the same and under the oath there stated, administered by me and taken by him. The deposition was wholly written by me and carefully read to the witness, and thereupon signed by him.

JAMES BAXTER,
Commissioner.

EXHIBIT "A."

In consideration of I. Morris furnishing to us, John B. Winters, John Winkelbach, & Frank Ganahl, the balance due on the purchase price of the Idaho & Vishnu mines, with interest from the 27th of November, '83, at 1½ per cent. per month, say the sum of $18,500, with interest at said rates & from said date, we hereby agree to convey to him one-fourth (¼) of said mining property and to pay such said advance

333 within one year from date of advance, with interest at one per cent. per month, out of the net earnings of the property, all bullion to be shipped through the banking-house of T. R. Jones, Salt Lake, & said advance to be credited with the net proceeds of the same, after paying the cost of mining & milling; it being understood that the whole of said mining property & the proceeds & yield thereof is hereby pledged & mortgaged for the payment of the said advance & interest within one year from the date of said advance. Should the said I. Morris desire another ¼, one-fourth, of said mine, we hereby agree to convey to him the said ¼ on payment to us of $10,000 in cash at the time of his making the said advance, or, by his creditors, the said advance with such sum of $10,000, this agreement & option to extend & be in force for the period of 30 days to allow said Morris the opportunity of inspection of said property, &c.

I, Isador Morris, hereby bind myself to use due diligence in the above matter, &, if possible, to secure the aforesaid advance to complete the purchase of said Idaho & Vishnu mines.

334 I hereby agree to the above & consent to the extension of 30 days' time from date for the payment of balance of the purchase price of the Idaho & Vishnu mines.

Dated Hailey, Jan'y 20th, 1884.

JACOB REESER,
By his attorney-in-fact, FRANK P. CAVANAH.

Commission to Take Testimony.

In the District Court of the Second Judicial District of the County of Alturas, Territory of Idaho.

The People of the United States in the Territory of Idaho to James Baxter, of Villaldama, Neuva Leon, of the Republic of Mexico, Greeting:

Whereas it appears to the judge of our district court of the second judicial district of the Territory of Idaho that Frank P. Cavanah, of Villaldama, in the Republic of Mexico, is a material witness in a certain action now pending in our said district court between George F. Settle *et al.*, plaintiffs, and John B. Winters *et al.*, defendants, and that the personal attendance of said witness cannot be procured at the trial of said action, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do
335 appoint you, a commissioner to examine said witness, and therefore we authorize and empower you at certain days and places, to be by you for that purpose appointed, diligently to examine said witness on the interrogatories annexed to this commission in respect to the questions in dispute herein, and on his oath, first taken before you, and cause the said examination of the said witness to be reduced to writing and signed by the same witness and by yourself, and return the same, annexed to this commission, unto our district court aforesaid with all convenient speed, enclosed under your seal.

Witness Hon. Case Broderick, judge of the second judicial district, at Hailey, in the county of Alturas, this 23rd day of August, 1884.

Attest my hand and seal of said court the day and year last above written.

[SEAL.] A. L. RICHARDSON, *Clerk*,
By E. E. RICHARDS, *Deputy Clerk*.

336 (Endorsed:) District court, second judicial district, county of Alturas. George F. Settle *et al.*, plaintiffs, *vs.* John B. Winters *et al.*, defendants. Commission to take testimony. Dated August 23rd, 1884.

337 In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JACOB WINKELBACH, Defendants.

Interrogatories to be propounded to Frank P. Cavanah, a witness in the above-entitled action on the part of said defendants.

1.

What is your name, age, and occupation, and where do you reside?

2.

Where did you reside in December, 1883, and January, 1884?

3.

Do you know the said plaintiffs and defendants or either or which of them, and how long and where have you known them?

4.

In 1883 or later, did you know of or have some information—and, if so, what and how derived—relating to a contract be-
338 tween the parties to this action touching the Vishnu and Idaho and other mining claims and property situate in Bear Creek mining district, Alturas county, Idaho Territory?

5.

State whether or not you were requested or authorized at any time—and, if so, when—by said plaintiffs or either and which of them to do any and what act or thing relating to said contract or the performance thereof; and what, if anything, and when you did in pursuance of said request, or authority. If you executed and delivered to either party any paper writing state the fact, to whom it was delivered, and the conversation and circumstances which took place at the time of giving of such authority and the making of said paper writing; and, if you are able to do so, annex to your deposition, with proper reference, the said paper writing, and please state whether it is the original, and how it again came to your hands.

6.

If you heard any conversation between said plaintiffs or either of them and the defendants or either of them during the month of December, 1883, or January, 1884, relating to the said contract or the property covered by said contract, state the said conversation fully and particularly.

339 7.

Do you know any other matters or things pertenent to the subject of the proceeding [preceding] interrogatories? If yes, state the same fully and in detail.

SUTHERLAND & McBRIDE,
BENNETT, HARKNESS & KIRKPATRICK, &
L. VINEYARD, *Def'ts' Att'ys.*

The foregoing interrogatories agreed to. All legal objections to any answers that may be made by the witness are waived.

HUSTON & GRAY AND
RICHARD Z. JOHNSON,
Pl'ffs' Att'ys.

Form of Deposition.

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants.

Deposition of Frank P. Cavanah, taken under the annexed
340 commission and in answer to the annexed interrogatories.

On the — day of ——, 1884, at ——, in the Republic of Mexico, Frank P. Cavanah, the above-named witness on the part of said defendants, personally appeared before the undersigned, James Baxter, commissioner, who administered an oath to said witness Cavanah that the evidence he should give in said action, in answer to said interrogatories hereto annexed, should be the truth, the whole truth, and nothing but the truth; whereupon the said several direct and cross-interrogatories were read to said witness, and he, upon his oath aforesaid, answered the same successively, and his answers were wholly written by said commissioner as follows:

(Set forth at large the interrogatories and answers, thus:)

1st question. What is your name, age, and occupation, and where do you reside?

Answer. My name is Frank P. Cavanah; my age, — years, &c.

And so with all the direct and cross-interrogatories. The witness should sign the deposition—that is, at the foot of the questions and answers. All the papers should be firmly attached together.

341 The commissioner should then add a jurat or certificate, signed by him as commissioner, as follows:

I hereby certify that the foregoing deposition was taken at the time and place mentioned in the foregoing caption to the same and under the oath there stated, administered by me and taken by him. The deposition was wholly written by me and carefully read to the witness, and thereupon signed by him.

——— ——,
Commissioner.

We mutually consent to the foregoing instructions and stipulate that the deposition taken according to said instructions and forwarded by mail to E. E. Richards, Hailey, Idaho Territory, shall be deemed regularly taken and sent.

HUSTON & GRAY AND
RICHARD Z. JOHNSON, *Pl'ffs Att'ys.*
SUTHERLAND & McBRIDE,
BENNETT, HARKNESS & KIRKPATRICK &
L. VINEYARD, *Def'ts' Att'ys.*

342 7.

State, if you know, whether either of the defendants—and, if either, which of them—in the month of January, 1884, offered to either of the plaintiffs—and, if to either, which of them—the endorsement of Col. E. A. Wall upon the promissory notes of the defendants, payable in six months, for the balance then due the plaintiffs under said contract; and, if so, what reply was made and by whom to such proposition? State fully all that was said by either party.

(Make 7th interrogatory in original draft No. 8.)

343 *Affidavit of Geo. F. Settle.*

In the District Court of the 2nd Judicial District of the Territory of Idaho in and for Alturas County.

THOMAS L. JOHNSTON, Plaintiff,
vs.
G. F. SETTLE & JACOB REESER, Defendants.

TERRITORY OF IDAHO, } ss:
County of Alturas, }

G. F. Settle, being first duly sworn, says that he is one of the defendants in the above action, and that he has been in possession of, under claim of title thereto, *to* the said Vishnu ledge since 1868, or to at least 200 feet thereof for more than 5 years prior to commencement of above action; that the said Vishnu on the surface is about 50 feet distant from the Idaho, and that in the shafts and tunnels below the surface the said Vishnu is distant from the Idaho from 35 to 46 feet apart, and that the said ledges run nearly parallel, and that there is no connection whatever between the two ledges, Idaho and Vishnu, and that from all the developments upon said
344 ledge, and the situation thereof affiant is certain they are two separate and distinct ledges; that at least there is no connection with each other at present. Affiant further states that about all the work that has been done, and all the ore extracted from said Vishnu mine has been taken out within the limits of the 200 feet owned, possessed, and worked by defendants since 1868, and up to time ½ of said Vishnu was sold to J. Reeser. Affiant further states that during all the working of said mine since 1868 it has never paid wages to the men working the same; that he has leased the said mine from time to time to various parties, and that taking all the time worked thereon and all the work done thereon it has not paid wages to the men working thereon; that no superintendent or manager of the working of the mine who is not thoroughly acquainted with the mine could begin to make said mine pay expenses; that the receiver appointed, John Andrewartha, knows nothing whatever of the Vishnu mine and cannot work the same

with a profit; that your affiant is informed and believes that the said John Andrewartha has already engaged a crew of men to work said Vishnu mine and is making great preparations
345 to work the same, and proposes to commence work thereon on Monday next, the 1st of Oct.; that the men employed by him or to be employed to work said mine are, as affiant is informed and believes, men entirely unfamiliar with the mine, who cannot work to the best advantage, and that none of the men familiar with the mine will be employed by said receiver.

Affiant states that regular miners' wages are $4.50 per day, and that said receiver will have to pay that sum for wages to a crew of men to work said mine — is sure to run the mine in debt, and that the mine will not pay expenses to hire men at the regular wages; that affiant is informed and believes that said receiver has stated that he intends to commence work right away, or by the 1st of Oct., with a force of men, and will work the mine extensively, even it only pay-expenses; that affiant is sure and positive that said receiver cannot work said mine the way he proposes and make a profit thereon, but that instead he is almost sure to run the mine in debt; that it is for the best interest of all concerned that said mine should remain
346 idle. Affiant further states that as soon as it can be conveniently done, suiting the convenience of the judge of said court and all parties interested, he will, through his attorney, move to dissolve the injunction issued in this action, and that said motion at the furthest will be made to be heard as soon as the judge of said court returns to Boise City from holding the Owyhee term of court, near the middle of October next; that the said injunction should be dissolved upon the showing to be made; that the said receiver will then be ousted, and that all his preparations for work and all work done will then be really a great injury and expense to affiant, for within that short time he can but incur expense and make preparations and do nothing of any advantage to the mine or to either of parties interested or to def'ts in interest; that the working of the mine for said short period is sure to result in loss and debt and expense, and that it is for the interest of all concerned that the mine should remain idle until said motion for a dissolution of injunction can be heard; that it will be time enough to commence working said mine after the hearing and determination of said motion.

Wherefore your affiant most respectfully asks, in the inter-
347 est of justice and right as well as in the interest of all concerned, that the said receiver, John Andrewartha, be directed and ordered not to commence work or operations on said mine until after the hearing said motion for a dissolution of the injunction, which will be made and heard between now and the 20th of October, or until further order by the judge of this court.

G. F. SETTLE.

Subscribed and sworn to before me this 29th of Sept., 1877.
[SEAL.] T. S. HART,
Probate Judge.

(Endorsed:) In dist. court, 2nd judicial district, Alturas county, I. T. Thos. L. Johnston *vs.* G. F. Settle *et al.* Affidavit of G. F. Settle. (Copy.)

348 *Assignment of Error.*

The defendants assign the following errors on which they will rely in the appellate court on appeal:

I.

Error in law occurring on the trial and excepted — by defendants in the following particulars, viz:

1. The court erred in receiving in evidence and refusing to strike out, on defendants' motion, the certified copy of the lease or agreement, annexed to the complaint, and the supplemental agreement, also annexed to the complaint, and thereupon ruling that the plaintiffs held the affirmative side of the case and were entitled to open and close.

2. The court erred in excluding the evidence offered by defendants in the answer of George F. Settle in an action heretofore brought against him in this court by Jacob Reeser, in which answer said Settle stated and admitted that one John Dunlay owned five and V. S. Anderson thirty-two and $\frac{5}{6}$ feet in the Idaho mining claim.

3. The court erred in overruling the following question put by defendants to witness Winkelbach: "Was one-half of the
349 proceeds paid as purchase-money or as rent?"

4. The court erred in overruling defendants' objection to questions put to witness George F. Settle and others calling for circumstances and conversations occurring prior to and at the time of the execution of the contract annexed to the complaint, and therein marked Exhibit A, to affect and control the construction and effect of said contract.

5. That the court erred in overruling defendants' objection to questions put to witness George F. Settle calling on him to say whether he assented to the contract annexed to the complaint, and therein marked Exhibit "A" "C," whether Anderson was authorized to execute it, and whether the execution thereof was assented to and ratified.

6. The court erred in overruling defendants' objection to the following question by plaintiffs put to witness, George F. Settle: "What, if any, directions had you given to Anderson to execute it or what authority?"

7. The court erred in overruling defendants' objection to the following question put by plaintiffs to said witness, George F. Settle: "What knowledge did you have of the working after the
350 29th of December and before the commencement of this action?"

8. The court erred in overruling defendants' objections to the following question put by plaintiffs to witness George F. Settle: "What directions, if any, did you give to Reeser in consequence of receiving such information?" And in overruling defendants' ob-

jection to the answer to said question and motion to strike out said answer.

9. The court erred in overruling defendants' offer in evidence of affidavit of George F. Settle, dated and sworn to on Sept. 29th, 1877, as to the mines in question being capable of paying working expenses or wages.

II.

Insufficiency of the evidence to justify the decision and findings of the court in the following particulars:

1. In finding, as stated in finding No. 1, that the instrument therein referred to as attached to the complaint and marked Exhibit "A" is a lease.

2. In findings numbered 3, 4, 6, 8, 10, and 19, that the parties stipulated in a lease.

351 3. In finding, as stated in finding numbered 3, that defendants were by said Exhibit A "licensed."

4. In finding, as stated in finding No. 4, that by said Exhibit "A" a rent or royalty was reserved to said plaintiffs, which defendants covenanted to pay.

5. In finding, as stated in finding No. 5 and 11, that defendants entered into and took possession under a lease or as tenants of plaintiffs.

6. In finding, as stated in finding No. 5, that defendants paid plaintiffs' rent or royalty.

7. In finding, as stated in finding No. 5, that the moneys received by plaintiffs from defendants were received as rent or royalty.

8. In finding, as stated in findings No. 6, 7, and 10, that by said Exhibit "A" it was stipulated that said defendants should have an option to purchase.

9. In finding, as stated in finding No. 6, that it was agreed that rent or royalty received by plaintiffs should be applied on purchase-money.

10. In finding, as stated in finding No. 7, that time was of the essence of the contract in said Exhibit A, or of an option to purchase.

352 11. In finding, as stated in finding No. 9, that no extension of time on Exhibit A after December 27, 1883 was given, promised, or assented to by plaintiffs.

12. In finding, as stated in finding No. 9, that there had been an extension before said date of the term of the lease.

13. In finding, as stated in finding No. 10, that defendants' option to purchase expired on the 27th day of December, 1883.

14. In finding, as stated in findings No. 11 and 12, that defendants neglected, failed, and refused to make said purchase.

15. In finding, as stated in findings No. 11 and 12, that defendants were in default in respect to making payment of $40,000 or any part thereof as purchase price.

16. In finding, as stated in finding No. 12, that possession for a term had been granted and extended.

17. In finding, as stated in finding No. 12, that defendants continued in possession after their rights had ceased or expired.

18. In finding, as stated in finding No. 13, that the Vishnu mine produces large or any quantities of high-grade or any grade of gold or silver ores.

19. In finding, as stated in finding No. 14, that defendants have neglected, failed, or refused to account with plaintiffs for gold or silver ore extracted or removed from the Vishnu mine or bullion made thereform.

353 20. In finding, as stated in finding No. 15, that plaintiffs did not acquiesce in nor consent to defendants working or mining upon said premises after December 27th, 1883.

21. In finding, as stated in finding No. 16, that plaintiff Reeser did not mill any rock or ore extracted by defendants from the Idaho mining claim in January, 1884, and did not deliver bullion therefrom to defendants.

22. In finding, as stated in finding No. 17, that defendants were not ready or able to pay the purchase price on or prior to December 27th, 1883, or at any time before the month of June, 1884.

23. In finding, as stated in finding No. 18, that plaintiffs demanded possession on the 22nd day of January, 1884.

24. In finding, as stated in finding No. 19, that defendants expended on said premises less than one-half of the proceeds of ores taken therefrom.

III.

That the decision and judgment are against law in the following particulars:

1. The findings of fact contain an erroneous rehash and construction of the written contract referred to as Exhibit "A."

354 2. Each and every of the conclusions of law filed with the findings of fact and numbered one to eight, inclusive, and the judgment based thereon are and each of them is contrary to law and erroneous.

3. The original complaint is insufficient. It does not state facts sufficient to constitute a cause of action, and facts necessary to a cause of action in favor of plaintiffs are not found.

4. All the issues made by the pleadings have not been disposed of by the findings.

5. The findings of fact do not warrant the judgment.

SUTHERLAND & McBRIDE,
BENNET, HARKNESS & KIRKPATRICK,
Att'ys for Def'ts.

The foregoing statement on appeal is agreed to by us as correct.

J. G. SUTHERLAND,
M. KIRKPATRICK,
Att'ys for Defendants.
HUSTON & GRAY,
Att'ys for Plaintiffs.

I hereby certify that the foregoing statement on appeal is correct, and the same is allowed and signed as made.

May 29th, 1885.

CASE BRODERICK,
District Judge.

355 (Endorsed:) Second district court, Idaho Territory. Geo. F. Settle *et al. vs.* John B. Winters *et al.* Statement on appeal. Filed May 29th, 1885. A. L. Richardson, clerk. Due service accepted of within statement on appeal May 29th, 1885. Huston & Gray, att'ys for plaintiffs.

356 *Notice of Appeal.*

In the District Court of the Second Judicial District of Idaho Territory in & for Alturas County.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants.

To R. Z. Johnson and Huston & Gray, att'ys for plaintiffs; A. L. Richardson, clerk of said court:

Please take notice that the defendants hereby appeal to the supreme court of Idaho Territory from the judgment entered in said cause above entitled on the 28th day of May, 1885, in favor of said plaintiffs and against defendants, and from the whole thereof, and also from the order of the court thereafter made on the same day overruling defendants' motion for a new trial in said cause.

Dated May 29th, 1885.

SUTHERLAND & McBRIDE,
BENNETT, HARKNESS & KIRKPATRICK,
Att'ys for Defendants.

357 Due service of the above notice of appeal is admitted this May 29th, 1885.

HUSTON & GRAY,
Att'ys for Plaintiffs.

(Endorsed:) Second district court, Idaho Territory. Geo. F. Settle *et al. vs.* John B. Winters *et al.* Notice of appeal. Filed May 29th, 1885. A. L. Richardson, clerk.

358 *Undertaking on Appeal.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

GEORGE F. SETTLE and JACOB REESER, Plaintiffs,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants.

Whereas the said defendants are endeavoring to appeal to the supreme court of Idaho Territory from the judgment entered in the above-entitled action in favor of said plaintiffs and against said defendants on the 28th day of May, 1885, and also from the order thereafter made by said district court in said action on the 28th day of May, 1885, denying the defendants' motion for a new trial:

Now, therefore, we, the undersigned, in consideration of said appeal, do undertake and promise that the appellants will pay all damages and costs which may be awarded against them on
359 said appeal or either of them, or on a dismissal of both or either of said appeals, not exceeding three hundred dollars on or for each.

Witness our hands and seals this 29th day of May, A. D. 1885.

J. M. BURKETT. [SEAL.]
J. C. FOX. [SEAL.]

TERRITORY OF IDAHO, } ss:
County of Alturas, }

J. M. Burkett and J. C. Fox, being duly sworn, each for himself says: I am a resident and householder within said Territory, and am worth the sum of six hundred dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. M. BURKETT.
J. C. FOX.

Sworn to and subscribed before me this 29th of May, A. D. 1885.
[SEAL.]
C. B. FOX,
Notary Public.

Approved May 29th, 1885.

CASE BRODERICK,
District Judge.

360 (Endorsed:) Second judicial dist., Idaho Territory. Geo. F. Settle *et al. vs.* John B. Winters *et al.* Undertaking on appeal. Filed May 29th, 1885. A. L. Richardson, clerk.

361 *Clerk's Certificate.*

TERRITORY OF IDAHO, } ss:
County of Alturas, }

I, A. L. Richardson, clerk of the district court of the second judicial district of Idaho Territory in and for Alturas county, do hereby certify that the foregoing transcript of pages 1 to 424, inclusive, contains full, true, and correct copies of the original answer, amended cross-complaint, affidavits, assignment of error, complaint, conclusions of law, commission, demurrer, deposition, exhibits, findings, form of deposition, judgment, notices, orders, stipulation, statement on appeal, and testimony in the case of Geo. F. Settle *et al. vs.* John B. Winters *et al.*, now remaining on file in my office, in said county of Alturas, and that an undertaking on appeal in due form has been properly filed.

[SEAL.] Witness my hand and the seal of said court, affixed this 11th day of September, A. D., 1885.

A. L. RICHARDSON, *Clerk,*
By E. E. RICHARDS,
Deputy Clerk.

362 *Order Setting Hearing.*

Supreme Court, Idaho Territory.

WEDNESDAY, *January 20th*, 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

By agreement of counsel for the respective parties, ordered that this cause be set for hearing on Monday, the 25th inst.

Argument.

TUESDAY, *January 26th*, 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

Now, on this day, this cause came regularly on to be heard. Messrs. Sutherland & McBride and Messrs. Bennett, Harkness & Kirkpatrick appearing as counsel for appellants and Richard Z. Johnson, Esq., and Messrs. Huston & Gray for respondents. M. Kirkpatrick, Esq., opened the argument on behalf of the appellants, during which the court adjourned the further hearing of said cause until to-morrow, the 27th inst., at 10 o'clock a. m.

363 WEDNESDAY, *January 27th*, 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

The argument of this cause, adjourned on yesterday for further hearing, was this day continued by M. Kirkpatrick, Esq., on behalf of appellants, during which the court adjourned the further hearing of said cause until to-morrow, the 28th inst., at 10 o'clock a. m.

THURSDAY, *January 28th, A. D.* 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

The argument of this cause, adjourned on yesterday, was this day continued by M. Kirkpatrick, Esq., on behalf of appellants, after which the court adjourned the further hearing of said cause until to-morrow, the 29th inst., at 10 o'clock a. m.

364 FRIDAY, *January 29th, A. D.* 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

The argument of this cause, adjourned on yesterday for further hearing, was this day continued by Richard Z. Johnson, Esq., on behalf of the respondents, during which the court adjourned the further hearing of said cause until to-morrow, the 30th inst., at 10 o'clock a. m.

SATURDAY, *January 30th*, 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

The argument of this cause, adjourned on yesterday for further hearing, was this day continued by Richard Z. Johnson, Esq., on behalf of respondents, during which the court adjourned the further hearing of said cause until Monday, February 1st, 1886, at 10 o'clock a. m.

365 MONDAY, *February 1st, A. D.* 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

The argument of this cause, adjourned on Saturday, Jan. 30th, for further hearing, was this day continued by Richard Z. Johnson, Esq., during which the court adjourned the further hearing of said cause until to-morrow, the 2nd inst., at 10 o'clock a. m.

TUESDAY, *February 2nd, A. D.* 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

The argument of this cause, adjourned on yesterday for further hearing, was this day continued by Richard Z. Johnson, Esq., and J. W. Huston, Esq., on behalf of respondents. During the argument of the latter the court adjourned the further hearing of said cause until to-morrow, the 3rd inst., at 10 o'clock a. m.

366 WEDNESDAY, *February 3rd,* 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

The argument of this cause, adjourned on yesterday for further hearing, was this day continued by J. W. Huston, Esqr., on behalf of respondents, after which John R. McBride commenced the closing argument on behalf of appellants, during which the court adjourned the further hearing of said cause until to-morrow, the 4th instant, at 10 o'clock a. m.

Order Submitting Cause.

THURSDAY, *February 4th, A. D.* 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.
} Appeal from Alturas County.

The argument of this cause, adjourned on yesterday for further hearing, was this day concluded by John R. McBride, Esq., on behalf

of appellants, and said cause was submitted and taken under advisement by the court.

367 *Judgment.*

FRIDAY, *March 5th, A. D.* 1886.

GEORGE F. SETTLE *et al.*, Plaintiff- & Respondent-,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.

An Appeal from the District Court of the Second Judicial District in and for Alturas County.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Chief Justice Hays, Justice Broderick concurring and Justice Buck dissenting therefrom, to the effect that the judgment of the court below be affirmed.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the second judicial district in and for the said county of Alturas in the above-entitled cause be, and the same is hereby, affirmed.

368 *Application for Allowance of an Appeal.*

Supreme Court of Idaho Territory.

GEORGE F. SETTLE and JACOB REESER, Respondents,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Appellants.

On this day came the above-named appellants and complain that error has been committed in the judgment and decree of this court, herein entered against them, to their prejudice, and pray the court to allow an appeal therefrom to the Supreme Court of the United States, that the same may be there reviewed and said error corrected.

BENNETT, HARKNESS & KIRKPATRICK,
SUTHERLAND & McBRIDE,
Att'ys for said Appellants.

(Endorsed :) Supreme court, Idaho Territory. George F. Settle *et al. vs.* John B. Winters *et al.* Application for allowance of appeal. Filed March 5th, 1886. A. L. Richardson, clerk.

369 *Allowance of Appeal.*

Supreme Court, Idaho Territory.

FRIDAY, *March 5th, A. D.* 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.

In this cause appellants, by their counsel, pray the allowance of an appeal from the judgment of this court, heretofore entered herein, to the Supreme Court of the United States; and thereupon such appeal is allowed by the court and the amount of the bond to be thereon given is fixed at the sum of three hundred dollars.

370 *Opinion.*

In Supreme Court, Idaho Territory.

GEORGE F. SETTLE and JACOB REESER, Respondents,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Appellants.

While time is not necessarily of the essence of the contract in equity, yet it may be made so by the parties.

Where the character of the property is such that it is liable to sudden fluctuation of value, time is of the essence of the contract. This rule is especially applicable to mining property.

Appeal from the district court of Alturas county.

On the 19th day of September, 1882, the respondents, who are the plaintiffs herein, entered into a contract in writing with the appellants, who are the defendants herein, as follows:

371 This indenture of lease, with privilege of purchase, made and executed this 19th day of September, A. D. 1882, by and by and between G. F. Settle and Jacob Reeser, of Rocky Bar, Alturas county, Idaho Territory, parties of the first part, and John Winkelbach, of said Rocky Bar, and John B. Winters and F. Ganahl, of the town of Hailey, I. T., parties of the second part, witnesseth:

That the said parties of the first part, for and in consideration of one dollar to them in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby covenant and agree to and with the said parties of the second part, their heirs or assigns, as follows, to wit:

The said parties of the first part hereby grant, demise, and lease to the said parties of the second part the following-described property, situate, lying, and being near Rocky Bar, Alturas county, I. T., to wit: All of that certain quartz-lode mining claim known as the

"Vishnu" and consisting of an undivided eight hundred feet; also all of that certain quartz-lode mining claim, consisting of fourteen hundred (1,400) feet, on that certain vein of quartz containing the precious metals, known as the "Idaho" and being the discovery claim on said "Idaho" ledge; also twelve hundred (1,200) feet on the "Golden" or "Sierra" quartz ledge; also twelve hun-
372 dred (1,200) feet, more or less, on the "Chauncy" quartz lode or mine; also the "Montana Tunnel" and tunnel right. All of the above mines and quartz-lode claims commence at Quartz gulch and run thence easterly towards "Dixie gulch"—the Vishnu, eight hundred feet (800); the Idaho, fourteen hundred feet (1,400); the Sierra or Golden, 1,200 feet, and the Chauncy, 1,200 feet, more or less—and are situate on the north side of Bear creek, on Idaho Hill; also four hundred feet (400) in the Wizzard King quartz lode, commencing at Dixie gulch and running westerly four hundred feet; also the mill site at the mouth of Quartz gulch, with the blacksmith shop and cabin thereon; all of the above-described property being situate at the upper end of Rocky Bar, in Bear Creek mining district, Alturas county, Idaho Territory, the "Vishnu" being highest on Idaho Hill, and below it the Idaho, and next below the Sierra or Golden and the Chauncy, being all the group of mines on said Idaho Hill south of Quartz gulch; also that certain engine and boiler, known as the old Idaho engine and boiler, now lying on said Idaho mill site, from the 27th day of November, 1882, on the
373 expiration of a certain lease of the Vishnu and Idaho mines executed and delivered by the parties of the first part to Thomas Kitto, Charles Davey, and S. Parkinson; or, in the event of the assignment of said lease to the parties of the second part before the said 27th day of November, 1882, then from the date of such assignment, until the 27th day of November, 1883, upon the following terms and conditions: The said parties of the second part, so long as they shall deem fit, to hold said property and to mine and extract ore therefrom and to pay to the said parties of the first part one-half of the gross proceeds in manner hereinafter specified, and when the sum of forty thousand dollars (40,000) shall have been paid, either out of the proceeds of the mines or otherwise, by the said parties of the second part to the parties of the first part the said parties of the first part hereby covenant and agree, for themselves, their executors, administrators, and assigns, to and with said parties of the second part, their heirs and assigns, to convey to them, by good and sufficient deed, all of the above-described property, free and clear of all incumbrances, upon such payment, provided the said sum of forty thousand dollars (40,000)
374 shall have been paid on or before the 27th day of November, 1883.

And the said parties of the second part hereby covenant and agree to enter upon said properties and to mine and extract ore from the same so long as they shall find it profitable; to do the work in a proper and workmanlike manner and at their own cost and expense, and to hold and keep said property free and clear of all cost,

charge, or lien for the working of the same, and out of the gross proceeds of said mines to pay one-half thereof as fast as taken out to the said parties of the first part in the manner hereinafter specified, and upon the expiration of the term hereby granted to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless on or before said 27th day of November, 1883, the said sum of forty thousand dollars ($40,000) shall have been paid; and in the event of the said parties of the second part or their assigns failing to comply with either of or any of the foregoing covenants or any covenant, promise, or thing herein contained on their part to be done, kept, or performed, that then it shall be lawful for said parties of the
375 first part to re-enter, possess, and enjoy the above-described property and premises and every part thereof; and the said parties of the second part hereby agree, in the event of such nonperformance on their part, to surrender possession of the said premises upon demand by said parties of the first part claiming their right to re-enter.

It is hereby mutually covenanted and agreed by and between the parties to this instrument that the said parties of the first part shall have the right at all times of inspecting the said mines above described and all mining operations and work thereon; that the said parties of the second part shall have the right at any time to stop work on said mines when they shall find or deem the same unprofitable; that in working said ores at each and every clean-up the said parties of the second part shall and will furnish a true account of all ores extracted and milled and all bullion received to the said parties of the first part; that in milling said ores so taken from said property the said parties of the first part, if they so desire, shall have an equal right with said parties of the second part in milling
376 said ores, cleaning and retorting the same, weighing and storing the bullion, until said parties of the second part receipt to them for one-half the gross proceeds, it being expressly understood that upon each clean-up the said parties of the second part are to receipt to the said parties of the first part that they own one-half of the same, and that the said parties of the second part hold the same for them, and the said parties of the second part are then to dispose of the bullion to the best advantage and pay to the parties of the first part one-half of the proceeds thereof, in money, currency, or coin, and upon such payment the parties of the first part will credit said purchase price of forty thousand dollars ($40,000) with the sum so received; and, lastly, that in no event shall the said properties above described or any part thereof be held for any claim, cost, charge, or lien for working the same by the said parties of the second part under this instrument, but that all such work shall be done at the expense of the said parties of the second part solely and alone; and the said parties of the first part, for themselves, their executors, administrators, and assigns, hereby covenant and agree to and with the said parties of the second part, their heirs and as-
377 signs, to convey by good and sufficient deed, all of the above-described properties free and clear of all incumbrances to

them, the said parties of the second part, or their assigns at any time upon the payment to them, the said parties of the first part, of the sum of forty thousand dollars ($40,000), either out of the proceeds of the mines or otherwise, on or before November 27th, 1883, in the manner hereinbefore specified by the said parties of the second part or their assigns; and it is hereby expressly and mutually covenanted and agreed that this covenant shall be taken, held, and deemed a covenant real, running with and binding the land.

In witness whereof the said parties have hereunto set their hands and seals this 19th day of September, 1882.

(Signed) GEO. F. SETTLE. [SEAL.]
JACOB REESER. [SEAL.]
JOHN WINKELBACH. [SEAL.]
JOHN B. WINTERS. [SEAL.]
F. GANAHL. [SEAL.]

Signed, sealed, and delivered in presence of—
SOL. NEWCOMER.

At the same time the following instrument in writing was executed by appellants and delivered to the respondents:

378 We, the undersigned, in consideration of the execution and delivery to us of a certain lease, with the privilege of purchase, of the Vishnu and Idaho mines, and of other property, of even date herewith, by G. F. Settle and Jacob Reeser, hereby covenant and promise to have each and every man employed by us in working said mines to sign the following contract, viz:

"In consideration of my being employed by John Winkelbach, J. B. Winters, and F. Ganahl, the lessees of the Vishnu, Idaho, and other mines, I hereby covenant and agree to look alone to said lessees for my pay, and hereby waive all rights or claim that I may have in law or equity against the property or the owners thereof, G. F. Settle and J. Reeser.

Witness our hands and seals this 19th day of September, 1882."

(Signed) F. GANAHL.
JNO. WINKELBACH.
JNO. B. WINTERS.

Signed, sealed, and delivered in presence of—
SOL. NEWCOMER.

Soon after the execution of this contract the defendants
379 bought in the Kitto lease mentioned in the contract, at an expense of about five thousand dollars, and entered into possession of the properties and began work thereon and extracted a large amount of ore. On the 24th day of November, 1883, the parties further agreed in writing as follows:

In consideration of the extension of the time of the above instrument until and including December 27, 1883, we hereby consent and agree to take a deed for 1,367 and one-sixth feet of the Idaho ledge

instead of 1,400 feet, as covenanted in the above instrument, and to pay interest at one per cent. per month on the balance of the purchase-money from now until December 27th, 1883, or any time it is paid prior to that date.

Witness our hands and seals this 24th day of November, 1883.

(Signed) F. GANAHL. [SEAL.]
JOHN WINKELBACH. [SEAL.]
JNO. B. WINTERS. [SEAL.]

In consideration of the above covenants we hereby extend the time on the within instrument until and including December 27th, 1883.

Witness our hands and seals this 24th day of November, 1883.

(Signed) GEO. F. SETTLE, [SEAL.]
By V. S. ANDERSON, *Ag't.*
J. REESER. [SEAL.]

380 That prior to the 27th day of December, 1883, defendants paid over to plaintiffs twenty thousand and seventy-five dollars and four cents, and on the 29th day of December, 1883, they paid over nine hundred and forty-eight dollars and ninety-six cents, making in all twenty-one thousand and twenty-four dollars, as one-half gross proceeds of ore taken out before the 27th day of December, 1883, and they continued to work a portion of said mines until the service of injunction in this action, on the 11th day of February, 1884, the same having been commenced February 4, 1884.

Defendants extracted ore from said mines during the time they worked it to the amount of over forty-two thousand dollars.

It is claimed by the plaintiffs that they demanded possession of this property in dispute about the 22nd day of January, 1884. This is denied by defendants. The trial court found that the demand was made.

The plaintiffs brought this action to restrain defendants from further interfering with the premises in dispute and for an accounting. The defendants answer the same, and also file a cross-complaint, wherein, among other things, they allege the making of the
381 contract; that the same was for the sale of the said premises; that a further extension thereof has been granted; that the same is still in force, and that they have exercised the option to purchase and paid as part purchase-money thereon the sum of twenty-one thousand and twenty-four dollars; that they had paid out for the Kitto lease five thousand dollars, and the further sum of thirty-four thousand dollars in working and improving the mine; that the defendants were ready, willing, and desirous to complete the contract and receive the deed and pay the balance of the purchase-money thereon and had tendered the same to the plaintiffs; that plaintiffs are unable to comply with their part of the contract; that defendants had greatly enhanced the value of the property; that they had expended a large amount of money between the 27th day of December, 1883, and the commencement of this action, and ask for a specific performance of the contract so far as plaintiffs

were able, and that they be enjoined from interfering with the property.

The plaintiffs answer the cross-complaint and, among other things, deny that the defendants exercised any option to purchase; they allege that the work done by defendants was on the Vishnu
382 mining claim; deny that defendants have expended a greater sum than one-half the net proceeds of the ore taken out; deny the enhancing of the value of the mine, and allege that defendants have taken from the mine ore of the value of forty-five thousand dollars. Plaintiffs aver that the money paid by defendants was for rent or royalty under the terms of the lease and not otherwise, and is less than one-half of the proceeds of ores taken out. Plaintiffs deny that the option to purchase has in any manner been extended beyond the 27th day of December, 1883, and allege that all work done after said date was by the wrongful act of the defendants and without plaintiffs' consent, and allege that on the 22nd day of January, 1884, they demanded possession of the property.

They allege that they were ready, able, and willing at all times up to the 28th day of December, 1883, to comply with the terms of the contract, and that defendants knew plaintiffs' title at the time of making the contract.

Plaintiffs further allege that the contract was drawn by one of the defendants, Frank Ganahl, who was an attorney of this court; that there was no other attorney that could be procured, and that said Ganahl promised and claimed that time was of the es-
383 sence of the contract; that if the whole sum of forty thousand dollars was not paid at the expiration of the contract, then defendants would quit and surrender up possession of the premises, and that he had full knowledge of the plaintiffs' title.

The case was tried by the court and, upon findings of fact and conclusions of law duly filed, judgment was entered in favor of the plaintiffs, from which defendants appealed to this court.

Bennett, Harkness & Kirkpatrick, Sutherland & McBride, of counsel for appellants.

R. Z. Johnson, Huston & Gray, of counsel for respondents.

HAYS, *C. J.:*

This case has been prepared with great care and presented with marked ability on each side.

It is conceded that the contract upon which this action is based was drawn by one of the defendants, who is a lawyer; that there was no other attorney present or to be procured at the time and place where it was drawn.

384 Our first duty is to ascertain what the parties themselves meant and understood by the terms of this instrument, for if the intension is plain and clear we ought, if possible, to give force and effect to their intent.

Reading this contract, then, in the light of surrounding circumstances as they existed at the time of drawing and executing the

same, we think it must be construed to be a lease with an option to purchase.

Did not the defendant who drew the contract so understand it? If not, did he not intend that the plaintiffs, who are unlearned in the law, should?

If he did not intend that the plaintiffs should so understand it, why did he begin the instrument, "This indenture of lease, with privilege of purchase?"

Again the words are used, "grant, demise, and lease;" then the usual reservations of a lease are found, that the parties of the first part shall have the right to inspect the mines at all times. "The parties of the second part agree to enter upon said properties and extract ore so long as they shall deem it profitable." They are to do the work in a proper and workmanlike manner, to keep the property clear of all lien for working the same, and to pay
385 one-half the gross proceeds of the mine, as fast as taken out, to the parties of the first part, and, "upon the expiration of the term hereby granted, to surrender up the said premises, with all the improvements, unless on or before the 27th day of November, 1883, the said sum of forty thousand dollars should have been paid;" and "upon failure to comply with any covenant, promise, or thing therein contained by parties of the second part, parties of the first part to re-enter, take possession," &c.

True, the contract provides that the parties of the first part shall credit the said purchase price of forty thousand dollars with the sum so received, and there are terms used that might be construed into a contract of sale; but in construing a contract it is contrary to well-settled rules to give it a narrow and technical interpretation, based upon some particular word or clause; the intent must be gathered from an examination of the instrument as a whole, and all clauses made consistent, if possible.

At the time of making the contract and as a part of the transaction the appellants executed and delivered to respondents the
386 agreement in writing drawn by defendant Ganahl, in which they mention the contract as a lease with the privilege of purchase, and they also describe themselves as lessees.

Under the circumstances, how must the respondents have considered the contract, and what did the appellants intend to have them understand?

We think the natural interpretation of the words used indicate the intention of the respondents to lease the premises in dispute to the appellants, and to give to them the right or option to purchase at any time during the life of said lease, upon the payment in full of the amount agreed upon. It seems to us that it must have been so understood by all the parties.

While time is not necessarily of the essence of the contract in equity, yet it may be made so by the parties themselves or by the circumstances of the case.

3 Parsons on Contracts, 383.
1 Pomeroy's Equity, § 455.
Green *vs.* Covilland, 10 Cal., 317.
Utley *v.* S. N. Wilcox Lumber Co., 26 N. W. Rep., 488.

Waterman, in his work on the Specific Performance of Con-
387 tracts, says: "Courts of equity formerly paid but little attention to the mere time at which the stipulations of a contract were to be performed, and carried the doctrine of relief notwithstanding a want of punctuality to an extravagant length."

"But the tendency of modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity and by a reasonable regard to the common accidents, mistakes, infirmities, and inequalities belonging to all human transactions."

Equity usually treats time as originally of the essence of the contract when the agreement shows that the parties intended that it should be so regarded.

Waterman on the Specific Performance of Contracts, § 459, 460.
Pom. Spec. Per., sec. 399, 401.
Grey *v.* Tubs, 43 Cal., 362.
Benedict *v.* Lynch, 1 Johns. Ch., 370.
7 Amer. Dec., 484.
Wells *v.* Smith, 7 Page, 22.
31 Amer. Dec., 274, & note.
Williard's Equity, 294.
Phelps *v.* Ill. Cen. R. R., 63 Ill., 468.

388 This rule seems to be well settled, and perhaps the more difficult question for solution now before us is whether time in this case has been made essential.

The contract provides that it shall run until the 27th day of November, 1883. It further provides for a conveyance, provided the sum of forty thousand dollars shall have been paid on or before the 27th day of November, 1883.

It further provides that upon the expiration of the term hereby granted to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless, on or before the said 27th day of November, 1883, the said sum of forty thousand dollars have been paid

Again, by the terms of the extension of Nov. 24th, which are "In consideration of the extension of the time of the above instrument for thirty days, or until and including December 27th, 1883," it would seem that the parties understood and intended to make time essential, for the respondents extend the time until and including December 27, 1883.

Each party is specific in fixing the limit of time.

Then, again, we may be aided in reaching a correct conclu-
389 sion by an examination of the character of the property. Real estate is less stable in this country than in England; hence our courts have been more liberal in extending the rule and allowing the special facts and circumstances of each case to have a more controlling influence.

Time is usually regarded as of the essence of the contract, both in

England and America, where the character of the property renders it liable to fluctuations in value.

Pom. Spec. Per., sec. 385.
Waterman on Spec. Per., 460.
Fry on Spec. Per., sec. 713–718.
Green *vs.* Covelland, 10 Cal., 330.
Jennison *v.* Leonard, 21 Wal., 302.
Goldsmith *v.* Gould, 92 Mass., 239.
Christian's Appeal, 85 Penn. State, 463; 9 Morr. Min. Rep., 42.

Fry on Spec. Per., sec. 716, says:

"The nature of all mining transactions is such as to render time essential, for no science, foresight, or examination can afford a sure guarantee against sudden loss, disappointment, and reverses, and a person claiming an interest in such an undertaking ought therefore to show himself in good time willing to partake of the possible loss as well as profit."

390 The same, in substance, has been stated by many other authors.

Waterman Spec. Per., sec. 460.
Pom. Spec. Per., sec. 385 & note.
Willard's Eq. Jur., 292.

We think this a wise rule, and that it should be adhered to, especially in a mining country like ours.

It is claimed by the appellants that respondent Reeser extended the time after the 27th of December, 1883. The trial court found that no such extension had been made, and the evidence abundantly sustains this finding.

It is also claimed by the appellants that no demand was made upon them by respondents for the possession of the mine. The trial court found the demand was made, and we think the evidence preponderates in favor of the finding.

The appellants offered payment in full in June, 1884; but, this being made long after the commencement of the action and more than five months after the time limited by the parties for such payment, we think cannot be available, for the reason heretofore stated.

391 It has been urged with great force that in this case appellants have paid to plaintiffs more than one-half of the agreed price, but it must be remembered that this was all from the moiety of ore or from the proceeds thereof stipulated to be paid, and must be treated as royalty or rent for the use of the mine.

We think in the case at bar a different rule should govern than what would be applied in an ordinary sale of real estate, for there usually the value of the realty remains the same, and if the grantor is permitted to retain both payment and realty great injustice might be done; but in the case at bar each ton of ore taken out depletes the mine so much, and in this case it has been exhausted to the amount of over forty-two thousand dollars; but it is claimed that the appellants have worked the mine at great loss. By the terms of

the contract they were at liberty to abandon the work whenever they should deem it unprofitable. Surely it will not be claimed that equity can be invoked to relieve a party from the result of a bad bargain alone.

Many other questions have been discussed and many points urged by appellants, and after a careful consideration of them all
392 we deem it unnecessary to discuss them at length, as we find no error.

Taking into consideration the contract as we construe it, the evident intent of the parties, the nature and character of the property in dispute, and we think the conclusion is irresistable that time is of the essence of the contract, and that a court of equity, with all its great and varied power, cannot decree a specific performance in this case.

Judgment is therefore affirmed.

Broderick, J., concurring.

Buck, J., dissenting.

(Endorsed:) Filed March 5th, 1886. A. L. Richardson, clerk.

393 *Dissenting Opinion.*

BUCK, *J.:*

Conceding for the present that the contract in question is a lease with the option to purchase, when does the lease go into operation and when is the option to purchase exercised? It seems to be mutual. It is signed by both parties and each covenants to do certain acts. As a lease, it was partly executed when the defendants entered into possession of the mine. Until the option to purchase was exercised the defendants held as lessees. Whenever they exercised that option, by the terms of the instrument they held as vendees. A sale is a contract whereby the ownership to property is transferred. The sale is completed when the possession and title pass from vendor to vendee. In the case at bar the possession was in defendants, but under the lease the title remained in the plaintiffs, the lessors. When the option to purchase was exercised the title passed from the lessors to the lessees, and their relation changed from lessor and lessee to vendor and vendee. The lessees having possession under an agreement to purchase at a purchase price of forty thousand dollars, the title passed whenever they exercised their option
394 by paying the purchase price or any part of it. By the terms of the contract all money paid to the plaintiffs was to be credited on the purchase price. Whenever, therefore, a credit was so made a part of the purchase price was paid, and, I apprehend, the option to purchase was exercised. We cannot call this payment royalty or rent, because to do so would contradict the express provisions of a sealed instrument. After the purchase this contract, which up to that time had operated as a lease, became in its legal effect a mortgage to secure the payment of the unpaid purchase price. It is said that under the terms of this instrument the defendants could abandon the venture at any time. This provision enables us to

appreciate the importance of that provision which makes the money paid purchase price. To induce defendants to continue the venture and not abandon it the plaintiffs stipulate that every dollar paid shall be a credit in payment of the mine. Can we say after, under this inducement, the defendants have expended a large amount of money and paid plaintiffs more than half the amount of the purchase price, that the plaintiffs may alter or disregard the express cove-
395 nant which has been the inducement to defendants' outlay, and say this twenty-one thousand dollars which you have paid us is only rent. You have not yet paid us any part of the purchase money; you have never exercised your option to purchase. It is claimed that time is of the essence of this contract. The general rule for the purchase of land is that time is not of the essence of the contract. It is claimed, however, that mining property constitutes an exception. Certain text-writers are quoted as sustaining this exception. An inspection of these references, however, give us but two or three ancient English cases, no American cases as cited. If this exception is established by adjudication it is remarkable that upon this coast, in the forty years of mining, no such has been adjudicated.

The terms used in the contract specifying the time at which the entire purchase price should be made and when the plaintiffs might re-enter cannot be said to determine that time is of its essence, for much stronger language has been adjudicated as meaning differently.

Conceding, however, for the argument that this exception
396 exists in the case of mere options for the purchase of mining property, the question remains, Is this contract simply an option? It is admitted that it is unusual in its terms, conditions, and covenants, and that it is difficult to construe. If we attempt to construe it on the theory that it is simply a lease with an option to purchase, the terms used will be unnecessary and confusing. If we consider, however, the circumstances of the parties and the property at the time the contract was executed, that, as seems established by undisputed testimony, *that* the plaintiffs wished to sell and the defendants to buy; that nothing whatever was said of leasing the property, and that the word was first used in the contract itself, and interpret this instrument with the light which these circumstances afford, we may understand the contract to be, what it is alleged to be, more than a mere option to purchase; that it was intended to secure the defendants in an anticipated large expenditure of money and to enable them to secure the fruit of their labor by finally obtaining the title to the property, and also to secure the plaintiffs, through the covenants to re-enter, against the loss of their
397 portion of the purchase price. If, indeed, it is conceded that it is generally understood by miners that time is of the essence in the mere option to purchase mines, that fact may account for the unusual covenants in the contract and indicate that they were intended to guard against that very construction and protect the defendants against it.

In addition to these considerations, in considering the relief sought by plaintiffs in enjoining defendants from occupying the disputed premises, we should remember that the plaintiffs' covenant in the

contract to give defendants a deed free and clear of all incumbrances of the premises in dispute. It is admitted that at the time when they claim that the $40,000 should have been paid and at the time this action was commenced the property was, and, as far as appears is yet, incumbered by a mortgage of at least seven thousand dollars. It is alleged that after the alleged termination of the lease demand was made of defendants for the premises. Was a mere demand sufficient? Should not that demand have been accompanied with an offer to fulfil on their part? This action to enjoin defendants and dispossess them in the premises is in effect an action for specific performance against defendants. The plaintiffs rely on the
398 strict letter of the law. They who seek equity must do equity, and I think the rule that a party who seeks specific performance must first be prepared to do equity. This the plaintiffs have never done. It is said that the amount of this incumbrance might have been deducted from the contract price—that the plaintiffs intended to pay this incumbrance out of the purchase price. The defendants were not required in the contract to provide for this incumbrance, nor to pay before it was discharged. Over twenty-one thousand dollars had already been paid, and yet the incumbrance of seven thousand was unprovided for. Are the plaintiffs in position to invoke this hard relief against defendants when they have never offered to perform and have never been in a condition to fulfil on their part? I think the suggestion that this incumbrance might have been provided against by retaining its amount by defendants out of the purchase-money is not tenable. This would involve a new contract; plaintiffs claim under the written one set out in the complaint. It is suggested that defendants' tender of the balance due was made six months after the time when the
399 lease terminated — is too late. I think equity will regard the plaintiffs' action as asking for specific performance of the contract as they allege it to be, and that defendants' cross-complaint in response thereto as setting up and praying specific performance as they understand the contract. That the defendants' tender is made in response to plaintiffs' demand and is sufficient in time. I think this view fully sustained by the authorities cited upon the argument, but I have not the time to classify them.

For these reasons I cannot assent to the opinion of the court.

(Endorsed:) Filed March 5th, 1886. A. L. Richardson, clerk.

400 *Proposed Statement or Special Findings.*

In the Supreme Court of Idaho Territory.

GEORGE F. SETTLE and JACOB REESER, Respondents,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Appellants.

The appellants request this court to find and make the following statement of the facts of the case:

The above-entitled cause having been heard on appeal and fully considered by the court, the court makes the following finding and statement of the facts of the case:

1. That on the 19th day of September, 1882, at Rocky Bar, Alturas county, Idaho Territory, the respondents, George F. Settle and Jacob Reeser, entered into a contract in writing with the appellants, John B. Winters, Frank Ganahl, and John Winkelbach, of which the following is a copy, the same being designated Exhibit "A," attached to the original complaint:

This indenture of lease, with privilege of purchase, made
401 and executed this 19th day of September, A. D. 1882, by and between G. F. Settle and Jacob Reeser, of Rocky Bar, Alturas county, Idaho Territory, parties of the first part, and John Winkelbach, of Rocky Bar aforesaid, and John B. Winters and F. Ganahl, of the town of Hailey, I. T., parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of one dollar to them in hand paid at and before the ensealing and delivery of these presents, the receip- whereof is hereby acknowledged, do hereby covenant to and with the said parties of the second part, their heirs and assigns, as follows, to wit: The said parties of the first part hereby grant, demise, and lease to the said parties of the second part the following-described property, situate, lying, and being near Rocky Bar, Alturas county, I. T., to wit: All of that certain quartz-lode mining claim known as the "Vishnu" and consisting of an undivided eight hundred feet; also all of that certain quartz-lode mining claim, consisting of fourteen hundred (1,400) feet on that certain vein of quartz containing the precious metals, known as the "Idaho;" also twelve hundred (1,200) feet on the "Golden" or "Sierra" quartz ledge; also twelve hundred (1,200)
feet, more or less, on the "Chauncy" quartz ledge or
402 mine; also the "Montana Tunnel" and tunnel right. All of the above mines and quartz-lode claims commence at Quartz gulch and run thence easterly towards Dixie Gulch. The Vishnu, eight hundred feet (800); the Ida, fourteen hundred feet (1,400); the Sierra or Golden, 1,200 feet, and the Chauncy, 1,200 feet, more or less, and are situated on the north side of Bear Creek, on Idaho Hill; also four hundred feet (400) in the Wizzard King quartz lode, commencing at Dixie gulch and running westerly 400 feet; also the mill site at the mouth of Quartz gulch, with the blacksmith shop and cabin thereon, all of the above-described property being situate at the upper end of Rocky Bar, in Bear Creek mining district, Alturas county, Idaho Territory, the Vishnu being highest on Idaho Hill, and below it the Idaho, and next below the Golden or Sierra and the Chauncy, being all the group of mines on said Idaho Hill south of Quartz gulch; also that certain engine and boiler known as the old Idaho engine and boiler, now lying on said Idaho mill site. From the 27th day of November, 1882, on the expiration of a certain lease of the Vishnu and Idaho mines, executed and delivered by the parties of the first part to Thomas Kitto,
403 Charles Davey, and S. Parkinson, or, in the event of the as-

signment of said lease to the parties of the second part before the said 27th day of November, 1882, then from the date of such assignment until the 27th day of November, 1883, upon the following terms and conditions: That said parties of the second part, so long as they shall deem fit to hold said property and to mine and extract ore therefrom, and [are] to pay to the said parties of the first part one-half of the gross proceeds in manner hereinafter specified, and when the sum of forty thousand dollars shall have been paid, either out of the proceeds *either out of the proceeds* of the mine or otherwise, by the said parties of the second part to the parties of the first part the said parties of the first part hereby covenant and agree, for themselves, their executors, and administrators and assigns, to and with said parties of the second part, their heirs and assigns, to convey to them, by good and sufficient deed, all of the above-described property free and clear of all incumbrance, upon such payment, provided said sum of forty thousand dollars ($40,000) shall have been paid on or before the 27th day of November, 1883.

And the said parties of the second part hereby covenant and
404 agree to enter upon said properties and to mine and extract ore from the same so long as they shall find the same profitable, do the work in a proper and workmanlike manner, and at their own cost and expense, and to hold and keep said property free and clear of all cost, charge, or lien for the working of the same, and out of the gross proceeds of said mine to pay one-half thereof, as fast as taken out, to the said parties of the first part in the manner hereinafter specified, and upon the expiration of the term hereby granted to surrender up the possession of said premises, with all the improvements, to the said parties of the first part unless on or before the said 27th day of November, 1883, the said sum of forty thousand dollars ($40,000) shall have been paid; and in the event of the said parties of the second part or their assigns failing to comply with either of or any of the foregoing covenant or any covenant, promise, or thing herein contained on their part to be done, kept, or performed, that then it shall be lawful for said parties of the first part to re-enter, possess, and enjoy the above-described property and premises and every part thereof; and the said par-
405 ties of the second part hereby agree, in the event of such non-performance on their part, to surrender possession of said premises upon demand by said parties of the first part claiming their right to re-enter.

It is hereby mutually covenanted and agreed by and between the parties to this instrument that the said parties of the first part shall have the right at all times of inspecting the said mines above described and all mining operations and work thereon; that the said parties of the second part shall have the right at any time to stop work on said mines when they shall find or deem the same unprofitable; that in working said ores at each clean-up the said parties of the second part shall and will furnish a true account of all ores extracted and milled and of all bullion received to the said parties of the first part; that in milling said ores so taken from said property the said parties of the first part, if they so desire, shall

have an equal right with the said parties of the second part in milling said ores, cleaning and retorting the same, weighing and storing the bullion, until the said parties of the second part receipt to them for one-half of the gross proceeds, it being expressly understood
406 that upon each clean-up the said parties of the second part are to receipt to the said parties of the first part that they own one-half of the same, and that the said parties of the second part hold the same for them, and the said parties of the second part are then to dispose of the bullion to the best advantage, and to pay to the parties of the first part one-half of the proceeds thereof in money, currency or coin, and upon such payment the parties of the first part will credit the purchase price of forty thousand dollars ($40,000) with the sum so received; and, lastly, that in no event shall the said properties above described or any part thereof be held for any claim, cost, charge, or lien for working the same by the said parties of the second part under this instrument, but that all such work shall be done at the expense of the said parties of the second part, solely and alone; and the said parties of the first part, for themselves, their executors, administrators, and assigns, hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, to convey by good and sufficient deed all of the above-described properties, free and clear of all incumbrances,
407 to them, the said parties of the second part, or their assigns, at any time upon the payment to them, the said parties of the first part, of the sum of forty thousand dollars ($40,000), either out of the proceeds of the mines or otherwise, on or before November 27th, 1883, in the manner hereinbefore specified by the said parties of the second part or their assigns; and it is hereby expressly and mutually covenanted and agreed that this covenant shall be taken, held, and deemed a covenant real, running with and binding the land.

In witness whereof the said parties have hereunto set their hands and seals this 19th day of September, 1882.

(Signed)	GEO. F. SETTLE.	[SEAL.]
	JACOB REESER.	[SEAL.]
	JOHN WINKELBACH.	[SEAL.]
	JOHN B. WINTERS.	[SEAL.]
	F. GANAHL.	[SEAL.]

Signed, sealed, and delivered in presence of—
SOL. NEWCOMER.

2. At the same time, to wit, on the 19th day of December, 1882, and as part of the same transaction, the appellants executed the following agreement, designated Exhibit B:

408 We, the undersigned, in consideration of the execution and delivery to us of a certain lease, with the privilege of purchase, of the Vishnu and Idaho mines and of other property, of even date herewith, by G. F. Settle and Jacob Reeser, hereby covenant and promise to have each and every man employed by us in

working said mines to sign the following contract, viz: In consideration of my being employed by John Winkelbach, J. B. Winters, and F. Ganahl, the lessees of the Vishnu, Idaho, and other mines, I hereby covenant and agree to look alone to said lessees for my pay, and hereby waive all right or claim that I may have at law or equity against the property or the owners thereof, G. F. Settle and Jacob Reeser.

Witness our hands and seals this 19th day of September, 1882.

F. GANAHL.
JNO. WINKELBACH.
JNO. B. WINTERS.

Signed, sealed, & delivered in presence of—
SOL. NEWCOMER.

3. At the time of the execution of the said contract, Exhibit A, there was an existing outstanding lease of the Vishnu and
409 Idaho mines to Thomas Kitto and his associates, which by its terms would expire on the 27th of November, 1882, the rental reserved thereon being one-third of the gross proceeds of all ores extracted by the lessees.

Immediately after the execution of said Exhibit A the appellants, at an expense of $5,000, bought in and retired said Kitto lease, and entered into the possession of the properties described in the contract and at once began to mine upon and develop the property, and so continued diligently to work and mine the same until the 11th of February, 1884, when they were stopped by the service of the injunction obtained by respondents in this cause. During all of said time the appellants worked and mined said property with all the force which could be beneficially or economically employed upon the same.

4. The appellants paid to the respondents, in accordance with the provisions of the contract and as fast as obtained, one-half of the gross proceeds of all ores extracted by them from the property during the time they remained in possession of the same, except two small lots the returns from which had not been received when
410 the injunction in this case was served. The amount so retained was about $1,000, and was afterwards applied by appellants to pay the expense which had been incurred in mining a quantity of ore which remained in the drifts and bins of the mine when said injunction was served, and which has passed into the possession of the respondents.

The whole amount so paid on the contract by the appellants to the respondents was the sum of twenty-one thousand and twenty-four dollars ($21,024.00).

5. In order to obtain the amount so paid to respondents, the appellants expended upon the property in the development thereof about fourteen thousand dollars ($14,000) more than the amount of the one-half gross proceeds retained by them under the contract, and this sum was expended by them before the property began to pay expenses.

6. On the 24th of November, 1883, a few days before the expiration of the time mentioned in Exhibit A, the following supplemental agreement in writing was made between said parties and endorsed on the original contract, known as Exhibit "C:"

411 In consideration of the extension of the time of the above instrument for thirty days, or until and including December 27th, 1883, we hereby covenant and agree to take a deed for 1,367⅛ feet of the Idaho ledge instead of 1,400 feet, as covenanted in the above instrument, and to pay interest at one per cent. per month on the balance of the purchase-money from now until December 27th, 1883, or any time it is paid prior to that date.

Witness our hands and seals this 24th day of November, 1883.

F. GANAHL. [SEAL.]
JOHN WINKELBACH. [SEAL.]
JOHN B. WINTERS. [SEAL.]

7. When the contract was made, September 19th, 1882, the property as it then appeared and in its then condition was not worth to exceed $35,000, and a fair rental from it would have been not to exceed one-fourth of the gross proceeds. The one-half gross proceeds was agreed upon in the contract because by its terms it was to be applied on purchase-money, and the enhanced price of $40,000 was agreed upon because the appellants had the right under the the contract to apply one-half the gross proceeds to its payment.

412 8. The appellants, by discovery and development of new ore bodies in the property, increased its value from $35,000 to not less than $80,000, this being the estimated value of ore in sight at the commencement of this action.

9. On the 28th day of December, 1883, two days after the time limited in the supplemental agreement, the appellants paid to the respondents and the respondents received and receipted for $948.96, proceeds of ore taken out by appellants prior to that date.

10. With the knowledge and without objection from the respondents, the appellants, from December 27th, 1883, to February 11th, 1884, expended in working and developing the property not less than two thousand dollars, and on or about the 20th day of January, 1884, a body of rich ore was opened by appellants in the property, which respondent Reeser then saw and examined.

11. Except by the bringing of this action, which was commenced February 4th, 1884, and process in which was served on appellants February 11th, 1884, the respondents gave no notice or warning of any kind to appellants that they had forfeited their rights
413 under the contract or that it was at an end, or that they, said respondents, claimed or considered it at an end; they made no demand for the balance of the purchase-money nor for possession of the premises, and they tendered no conveyance nor offered to convey the same to appellants.

12. A part of the property, the Vishnu mine, is encumbered by a mortgage for $7,372.54 and interest, executed by respondent Reeser

to one Pfeiffer, which mortgage was in existence on and prior to the 27th day of December, 1883, and remains unsatisfied, and there is no evidence that respondents ever offered to pay off said mortgage lien or to procure a release of the same.

13. The fee of all the mining claims mentioned in Exhibit A is in the Government of the United States. Five feet, undivided, of the Idaho claim stands in the name of one John Dunlay, and was so held on and prior to the 27th December, 1883. The principal value of said mining claims exists in the Idaho and Vishnu mines, the claims being comparatively of but little value.

14. In the month of June, 1884, and before the filing of the
414 answer and cross-complaint, the appellants tendered to respondents the balance, with interest, of the $40,000 mentioned in said Exhibit A, amounting to about $21,000, and in their cross-complaint prayed for a specific performance of said contract.

15. That at the expiration of the time fixed for the payment of the $40,000 mentioned in Exhibit A neither party did any act to indicate or in any way signified that the contract was ended or abandoned. This action was instituted on the 4th of February, 1884, and the motive or one of the motives for instituting it was the discovery by defendants, about the 20th of January, 1884, of a rich chimney or body of ore in the mine.

16. The respondents, by their declarations and acts during the occupation of the premises by appellants, gave the appellants to understand that as long as they, the appellants, continued in good faith and with diligence in the execution of the contract the time of performance mentioned therein would not be strictly insisted upon, but that a reasonable extension would be granted.

415 17. The respondent Reeser, by his declarations and acts during the occupation of the premises by appellants, gave the appellants to understand that as long as they, the appellants, continued in good faith and diligence in the execution of the contract the time of performance mentioned therein would not be strictly insisted upon, and that a reasonable extension would be granted.

18. On the trial in the district court George F. Settle, one of the respondents and a witness for respondents, was permitted to testify, in response to questions by counsel for respondents, as to various circumstances and conversations between the parties to the contract, Exhibit A, as occurring prior to and at the time of its execution, to affect and control the construction and effect of said contract. The appellants objected to such questions and to the testimony offered as incompetent, and because the original complaint alleges the agreement as written to be the agreement of all the parties, and precludes the respondents from thus seeking to modify or affect its construction. The court overruled said objections and permitted such testimony to be given; to which ruling the appellants then and there excepted.

19. The appellant, John Winkelbach, being called and sworn as a witness in the district court in behalf of appellants, was
416 asked by appellants' counsel the following question: "Was one-half of the proceeds paid as purchase-money or as rent?"

The question had reference to the object and purpose of the payments of one-half gross proceeds mentioned or stipulated for in the contract, Exhibit A. The respondents objected to the question on the ground that it was irrelevant and immaterial. The court sustained the objection, and appellants then and there duly excepted.

20. It was alleged in the amended cross-complaint and denied in the answer thereto that one John Dunlay owned five feet, undivided, of the Idaho mining claim. On the trial in the district court the appellants offered in evidence, as tending to prove the said allegation of the amended cross-complaint, the answer of respondent, Geo. F. Settle, in an action theretofore brought against said Settle by respondent, Jacob Reeser, in which answer said Settle stated under oath that said John Dunlay owned five feet in said Idaho mine. The respondents objected to the evidence offered, on the ground that the same was irrelevant and immaterial. The district court sustained the objection and the appellants then and there duly excepted.

The within request refused for the reasons set forth in the order entered this 6th day of March, 1886.

JAMES B. HAYS,
Chief Justice of Idaho Ter.

Filed March 6th, 1886.
A. L. RICHARDSON, *Clerk.*

417 *Refusal of Court to Settle Statement.*

Supreme Court, Idaho Territory.

SATURDAY, *March 6th*, 1886.

GEORGE F. SETTLE *et al.*, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS *et al.*, Defendants & Appellants.

The counsel for the appellants comes and asks the court to make certain findings as a statement of the facts of the case, which requested findings are in writing and now filed.

The court refuses to make said findings or any of them for the reason that the case was tried before the district court without a jury and [on] findings of fact and conclusions of law duly filed therein and judgment has been affirmed by the decision of this court, and by such affirmance such findings are adopted by this court and furnish a sufficient statement of the facts of the case. (To the refusal of the court to find and make such statement of the facts of the case the appellants now duly except.)

The appellants further move the court to make a statement of facts as the court may find the facts to be upon the subject-matter of each of the aforesaid requests. The court overrules said
418 motion and declines to make such finding or statement on the same ground hereinbefore set forth, and the appellants thereupon duly except.

On motion of appellants' attorney, ordered that there be a stay of remittitur herein for a period of thirty days from this date.

419 *Bond on Appeal.*

In the Supreme Court of Idaho Territory.

GEORGE F. SETTLE and JACOB REESER, Respondents,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Appellants.

Know all men by these presents that we, R. Mackintosh and A. Hanaur are held and firmly bound unto the above-named George F. Settle and Jacob Reeser in the sum of three hundred dollars, to be paid to said parties, their executors or administrators; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of March, A. D. 1886.

The condition of the above obligation is such that whereas the above-named John B. Winters, Frank Ganahl, and John Winkelbach have taken their appeal to the Supreme Court of the United States from the judgment and decree heretofore herein entered against them in the supreme court of the Territory of Idaho
420 and said appeal has been duly allowed by said court:

Now, therefore, if the above-named appellants shall prosecute their said appeal to effect and answer all costs and damages which shall be adjudged against them therein if they fail to make good their appeal, then this obligation to be void; otherwise to be and remain in full force and virtue.

R. MACKINTOSH. [SEAL.]
A. HANAUR. [SEAL.]

Sealed and delivered in presence of—
M. KIRKPATRICK.

Approved.

JAMES B. HAYS,
Chief Justice of the Supreme Court of Idaho Territory.

(Endorsed:) George F. Settle *et al. vs.* John B. Winters *et al* Bond on appeal. Filed April 5th, 1886. A. L. Richardson, clerk.

421 *Assignment of Errors.*

GEORGE F. SETTLE and JACOB REESER, Plaintiffs & Respondents,
vs.
JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKELBACH, Defendants & Appellants.

The appellants make the following assignment of errors:

I.

The original complaint does not state facts sufficient to constitute a cause of action, and facts necessary to a cause of action in favor of plaintiffs (respondents) are not found.

II.

The decision of the supreme court of Idaho affirming the judgment of the trial court is erroneous and against law, in this:

1. The so-called findings of fact of the trial court, which are adopted by said supreme court as a sufficient statement of the facts of the case, are for the most part conclusions of law, and they are in many instances contradicted by admissions contained in the pleadings.

2. Finding No. 1 is a conclusion of law and erroneous in
422 construing the instrument therein referred to, and attached to the complaint and marked Exhibit A, to be a lease and that the defendants were thereby "licensed."

3. Findings 2, 3, 4, 6, 8, 10, and 19 are conclusions of law and erroneous, in that it is therein stated that the parties stipulated or contracted in and by a lease.

4. Finding 3 is also a conclusion of law and erroneous, in that it states that the defendants were by said Exhibit "A" "licensed."

5. Finding 4 is also a conclusion of law and erroneous in finding that in and by said Exhibit "A" a rent or royalty was reserved to the plaintiffs which defendants covenanted to pay.

6. Finding 5 is a conclusion of law and erroneous, in that it states that defendants entered and took possession of said property under a lease or as tenants of plaintiffs, and paid plaintiffs rent or royalty, and the moneys so received by plaintiffs were received as rent or royalty under and according to the terms of said lease, the said contract by its terms providing that said payments as made "shall be credited on the purchase price of $40,000."

423 7. Finding 6 is a conclusion of law and erroneous, in this, that it finds that in and by said Exhibit A it was stipulated that defendants should have an option to purchase, and that rent or royalty received by plaintiffs should be applied on purchase-money.

8. Finding 7 is a conclusion of law and erroneous in finding that time was, by the terms of said contract and by the understanding and agreement of the parties thereto, of the essence of the contract.

9. Finding 8 is erroneous as a construction of said contract in stating that the defendants thereby agreed and covenanted, upon the expiration of the time therein mentioned, to surrender up the possession of said premises, with all the improvements, to the plaintiff, unless on or before said 27th day of November, 1883, the said sum of $40,000 should have been paid, it appearing by said contract that the stipulation to surrender was upon the further condition that plaintiffs should make demand claiming their right to re-enter.

10. Finding 9 is a conclusion of law and erroneous in stat-
424 ing that the plaintiffs extended the term and time of a lease, and is further erroneous in finding that no further extension

of said time was ever given, promised, or assented to by plaintiffs, it being admitted in the pleadings that the defendants entered into the possession of the premises under the said contract immediately after its execution and continued in possession, diligently working and developing the same and making valuable improvements thereon, until the 11th day of February, 1884, and expended therein after the 27th day of December, 1883, the sum of $2,000, and that said continued possession and work after said 27th of December, 1883, were with the knowledge and without objection from the plaintiffs, and that during the period of their possession of said premises defendants paid to plaintiffs on said contract more than one-half of the amount of the purchase-money mentioned therein, to wit, the sum of $21,024, and that defendants paid to plaintiffs on the 29th day of December, 1883, two days after the alleged default, the sum of $948.96, part of said $21,024, and plaintiffs received and receipted for the same, the said admitted facts amounting to a waiver or further extension of the time mentioned in said contract.

425 11. Finding 10 is a conclusion of law and erroneous in finding that defendants' right or option to purchase said premises expired with the 27th day of December, 1883.

12. Finding 11 is a conclusion of law and erroneous in stating that defendants neglected, failed, and refused to make said purchase, the defendants having tendered, in June, 1884, to plaintiffs the balance of the said purchase-money, and in their cross-complaint having offered to pay the same and complete said purchase. Said finding is erroneous, in matter of fact, in finding that the sum of $21,024, paid by defendants to plaintiffs, was less than one-half of the gross proceeds of said mines, it being admitted in the pleadings that said sum was substantially one-half of said gross proceeds. Said finding is further erroneous in stating that said amount so paid was paid as rent or royalty, the contract itself providing that said payments should be credited as fast as made on purchase-money.

13. Finding 12 is a conclusion of law and erroneous, in that it states or assumes that defendants neglected, failed, and refused to make said purchase and were in default in respect to making

426 said payment of $40,000 or any part thereof, and in finding that possession for a term or by a lease had been granted and extended, and in finding that the defendants continued in possession after their rights had expired.

14. Finding 14 is erroneous as matter of fact in finding that defendants have neglected, failed, and refused to account with plaintiffs for one-half of the proceeds of gold and silver ores extracted from said Vishnu mine, the contrary being substantially admitted in the pleadings.

15. Finding 15 is erroneous, it being admitted by the pleadings that the continued possession and work of the defendants upon said premises after the 27th day of September, 1883, were with the knowledge of and without objection from the plaintiffs.

16. Finding 17 is erroneous in stating that the inability of defendants to pay the balance of the purchase-money of $40,000 did not arise from any act of the plaintiffs, it appearing from the plead-

ings and record that the defendants were dispossessed and prevented from working the said premises, on the 11th day of February, 1884, under the mandatory injunction wrongfully sued out by
427 plaintiffs on the original complaint, and thereby deprived of the means of making said payment.

17. Finding 19 is contradicted by the pleadings, it being substantially admitted thereby that the defendants expended on said premises, in development and other necessary and proper work, more than one-half the proceeds of ores taken by them therefrom, to wit, the sum of $34,000.

III.

Material issues of fact made by the pleadings have not been disposed of by the findings.

1. It is admitted in the pleadings that a part of the contracted property, the Vishnu mine, is encumbered by a mortgage for $7,372.54 and interest, executed by respondent Reeser to one Pfeiffer, which mortgage lien was in existence on and prior to the 27th day of December, 1883, and remains unsatisfied and uncancelled.

In reference thereto the plaintiffs allege that on the 27th day of December, 1883, they were ready, willing, and able to have said mortgage released and cancelled of record and the premises discharged from the lien thereof, and that they then and there offered to defendants so to do if defendants desired and were able to
428 purchase said properties, but that defendants then acknowledged their inability to make said purchase or to comply with said Exhibit A or to avail themselves of the same. These allegations of plaintiffs are denied, and as to the truth thereof there is no finding whatever.

2. There is no finding as to whether John Dunlay is and was, on the 27th day of December, 1883, the owner of five feet, undivided, of the Idaho mining claim.

3. There is no finding as to whether defendant Winters is and was, on the 27th day of December, 1883, the owner of 37½ feet, undivided, of the Idaho mining claim.

4. The supreme court of Idaho erred in refusing to find and make a statement of the facts of the case as requested by the defendants.

IV.

1. Each and every of the conclusions of law of the trial court, which were adopted by the supreme court of Idaho and numbered from one to eight, inclusive, and the decision and decree based thereon, are and each of them is contrary to law and erroneous and not warrented by the findings of fact or by the admitted facts of the case.

429 The trial court erred in overruling the demurrer to plaintiffs' original complaint, and the supreme court of Idaho erred in sustaining said ruling of the trial court.

3. On the trial in the district court George F. Settle, one of the respondents and a witness for respondents, was permitted to testify,

in response to questions by counsel for respondents, to various facts and conversations between the parties to the contract, Exhibit A, occurring prior to and at the time of its execution to affect and control the construction and effect of said contract.

The appellants objected to such questions and to the testimony offered as incompetent and because the original complaint alleged the agreement as written to be the agreement of all the parties, and precludes the respondents from thus seeking to modify or affect its construction.

The court overruled said objections and permitted such testimony to be given; to which ruling the appellants then and there duly excepted.

4. The appellant, John Winkelbach, being called and sworn
430 as a witness in the trial court in behalf of appellants, was asked by appellants' counsel the following question:

"Was one-half of the proceeds paid as purchase-money or as rent?"

The question had reference to the object and purpose of the payments of one-half gross proceeds mentioned and stipulated for in contract, Exhibit "A." The respondents objected to the question on the ground that it was irrelevant and immaterial. The court sustained the objection, and appellants then and there duly excepted.

5. It was alleged in the amended cross-complaint and denied in the answer thereto that one John Dunlay owned five feet, undivided, of the Idaho mining claim. On the trial in the district court the appellants offered in evidence, as tending to prove said allegation, the answer of respondent, George F. Settle, in an action theretofore brought in said court against said Settle by respondent, Jacob Reeser, in which answer said Settle stated under oath that said John Dunlay owned five feet in said Idaho mine. The respondents objected to the evidence offered on the ground that the same was irrelevant and immaterial. The trial court sustained the objection and the appellants then and there duly excepted.

431 BENNETT, HARKNESS & KIRKPATRICK,
SUTHERLAND & McBRIDE,
Attorneys for Appellants.

(Endorsed:) George F. Settle *et al. vs.* John B. Winters *et al.* Assignment of errors. Filed April 26th, 1886. A. L. Richardson, clerk.

432 UNITED STATES OF AMERICA, } *ss:*
Territory of Idaho, }

I, A. L. Richardson, clerk of the supreme court of Idaho Territory, hereby certify that the foregoing contains a true copy of the record and proceedings in the case of George F. Settle *et al. vs.* John B. Winters *et al.*, lately decided in said court, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Boise City, in said Territory, this 12th day

of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Supreme Court Seal, Idaho Territory.]

A. L. RICHARDSON,
Clerk Supreme Court, Idaho Territory.

433 The United States of America to George F. Settle and Jacob Reeser, Greeting:

You are cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, District of Columbia, on the second Monday of October, 1886, pursuant to an appeal allowed by the supreme court of the Territory of Idaho on the 5th day of March, 1886, and duly entered on the records of said court, in a cause wherein John B. Winters, Frank Ganahl, and John Winkelbach are appellants and you, the said George F. Settle and Jacob Reeser, are appellees, to show cause, if any there be, why the judgment rendered in said cause by the supreme court of the Territory of Idaho on the 5th day of March, 1886, against the said appellants should not be reversed and the errors therein corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. James B. Hayes, chief justice of the su-
434 preme court of Idaho Territory, this 9th day of September, A. D. 1886.

JAMES B. HAYS,
Chief Justice Supreme Court of Idaho Territory.

A copy of the within and foregoing citation was personally served on us and the original exhibited this 13th day of September, 1886, and due service is admitted.

RICHARD Z. JOHNSON,
HUSTON & GRAY,
Att'ys for Pl'ffs.

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In the Supreme Court

OF THE

UNITED STATES.

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Respondents,

vs.

JOHN B. WINTERS,
FRANK GANAHL, AND
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APPELLANTS' BRIEF.

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Attorney for Appellants.

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APPELLANTS' BRIEF.

On the 19th day of September, 1882, the respondents entered into a contract in writing with the apellants which, under the guise of a lease, provides for the sale to appellants of certain mining claims and personal property, therein described, among which were the lode claims, "Vishnu" and "Idaho," situated in Bear

Creek Mining District, Alturas county, Idaho Territory. This contract is attached as Exhibit "A" to the original complaint and appears at pages 4 to 6 of the Transcript.

It is provided, among other things in the contract, that respondents upon payment by appellants of a given sum within a given time, would convey to appellants "their heirs and assigns by good and sufficient deed all of the above described property, free and clear of all incumbrances." Upon the allegation that appellants had failed to make full payment within the stipulated time, respondents instituted this action, claiming a forfeiture. To the complaint a demurrer was interposed (Trans. p. 8) which being overruled the appellants answered, and subsequently, having made a tender to the respondents of the balance remaining due on the contract filed a cross-complaint and an amended cross-complaint (p. 12) praying, upon the equitable circumstances of the case, that respondents be decreed to specifically perform the contract by executing a conveyance to the appellants. To the amended cross-complaint there was an answer (p. 16) and upon these pleadings a trial was had, resulting in a judgment for the respondents, which, on appeal, was affirmed by the Supreme Court of Idaho. From the latter judgment the present appeal is prosecuted.

The evidence at large is brought up, and this condition of the record requires explanation. We are

aware of the Act of Congress of April 7, 1874, providing, "That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the Court on the admission or rejection of evidence, when excepted to, shall be made and certified by the Court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

But suppose the Court below refuses to make an adequate statement of the facts of the case: refuses to make a finding or any statement whatever regarding a material issue presented by the pleadings, is the unsuccessful party without a remedy? May he not request the Court below to make such finding or statement, and bring the subject matter here upon exception to the refusal of that Court so to do, and in that event will not this Court look into the record and ascertain the facts for itself? We venture to believe that it would, and, if so, it would be proper in such a case to bring up the evidence at large. This is such a case.

For example:

By way of showing that there was no forfeiture by appellants of their interests under said contract, and no right in respondents to declare the alleged forfeiture, appellants allege in their cross-complaint (Trans. p. 14) that at no time since the making of said con-

tract have the respondents been able to make the conveyance required therein, and this for the reason, among others, that part of the contracted property, the Vishnu mine, was encumbered by a mortgage for $7,372 and interest, executed by respondent Reeser to one Pfeiffer, which mortgage was in existence on and prior to the 27th December, 1883, the day of the alleged forfeiture, and still remained uncancelled

In reference thereto, the respondents in their answer to the cross-complaint, alleged that on said 27th December, 1883, they were ready, willing and able to have said mortgage released and cancelled of record and the premises discharged from the lien thereof, and that they then and there offered to appellants so to do, if they so desired and were able to purchase said properties, but that appellants then acknowledged their inability to make said purchase, or to comply with said Exhibit A, or to avail themselves of the same (Trans. p. 18.) These allegations of respondents stand denied by force of the statute.

It will be conceded that a material issue was thus presented: for if the respondents were at the given time themselves unable to comply with the contract by reason of incumbrances existing upon the property which they did not offer to remove, and if appellants did not waive their right to have them removed, then respondents were in no condition to declare or claim a

forfeiture, and the time of performance was necessarily extended to the appellants, and the obligations of the contract continued in force.

Delavan vs. Duncan, 49 N. Y., 485.
Pomeroy on Spec. Perf., Sec. 337, 381, and cases there cited

Now there was no evidence whatever that the respondents ever offered to release this mortgage, the existence of which was admitted in the pleading, nor was there any evidence that the apellants in any manner waived their right to have it removed. Assuredly the appellants were entitled to a finding on this issue. Yet it was found impossible to obtain it. The Supreme Court of Idaho simply adopted the findings made by the Trial Court. Those findings are mostly conclusions of law, and entirely ignore this and other issues, although the attention of the Court was called to them.

At the proper time counsel for appellants presented to the Supreme Court of Idaho a statement of facts covering all the material issues in the case, including the issue regarding said mortgage on the Vishnu, and requested the Court to make said statement, as provided in the Act of Congress of April 7, 1874, above referred to (Trans. pp. 170-177.) The Court thereupon entered an order refusing to make said statement or any part of it, "for the reason," as stated in the order, "that the case was tried before the District Court without a jury, and findings of fact and conclu-

sions of law duly filed therein, and judgment has been affirmed by the decision of this Court, and by such affirmance such findings are adopted by this Court, and furnish a sufficient statement of the facts of the case."

Counsel for appellants thereupon moved the Court to make a statement of facts as the Court might find the facts to be upon the subject matter of each of said requests.

"The Court overruled said motion and declined to make such finding or statement on the same ground hereinbefore set forth." And the appellants thereupon duly excepted.

See this order at page 177 of Transcript.

Having thus failed to obtain a finding or adequate statement of the facts of the case, the appellants knowing of no other settled practice under said statute, have been compelled to bring up the evidence at large, and would request this Court, in order to prevent a failure of justice, to look into it and find the facts for itself.

Many material facts, however, are settled by the pleadings. Thus the making of the original contract, on the 19th of September, 1882, which is set forth by the respondents as Exhibit "A" attached to their complaint, and alleged and admitted to be the contract

of all the parties. It also appears from the complaint that on the 24th of November, 1883, a few days before the expiration of the term limited in the original contract, the plaintiffs by a supplemental agreement in writing endorsed on the original contract, extended the time to the 27th day of December, 1883. This instrument is designated Exhibit "C" in the complaint and is in the following words.

Dated November 24, 1883.

"In consideration of the extension of the time of the above instrument until and including December 27, 1883, we hereby consent and agree to take a deed for 1367 and one-sixth feet of the Idaho ledge instead of 1400 feet as covenanted in the above instrument, and to pay interest at one per cent. per month on the balance of the purchase money from now until December 27th, 1883, or any time it is paid prior to that date."

Witness, etc., (signed and sealed by the purchasers-appellants).

"In consideration of the above covenant we hereby extend the time on the within instrument until and including December 27th, 1883."

Witness, etc, (signed and sealed by the rendors-respondents). Trans. p. 7.

It is also admitted in the pleadings that immediately after the execution of the original contract the appellants brought in the outstanding Kitto lease, mentioned therein at an expense of $5,000, and took possession of the properties described in the contract, and at once began to mine upon and develop the same, and so continued diligently to work and mine thereon until the 11th day of February, 1884, when they were stopped by the service of the injunction obtained by the respondents in this case. And further, that during said time the appellants paid to the respondents, as fast as obtained, one-half of the gross proceeds of all ores extracted from the mines, the amount so paid on the contract being $21,024. On the 29th day of December, 1883, two days after the time limited in the supplementnl agreement, the appellants paid to the respondents, and the respondents received and receipted for $948.96, proceeds of ore taken out prior to that date. With the knowledge and without objection from respondents, the appellants expended, from December 27th, 1883, to February 11, 1884, in working and developing the property, not less than $2,000. In the latter part of January, 1884, ore taken out by appellants in December, 1883, was milled at Reeser's mill by Reeser's permission. On the 20th of January, 1884, a chimney of rich ore was opened by appellants in the property, which fact was known to respondents at the commencement of the action (see Complaint, p. 3), thus largely enhancing the value of the property.

While all this was going on no notice or warning of any kind was given by respondents to appellants that they had forfeited the contract, or that it was at an end, or that they claimed or considered it at an end; they tendered no conveyance, and they made no demand for possession, or for the balance of the purchase money, nor offered to convey the property, no notice of any kind until the bringing of this action, process in which was served February 11th, 1884. Nothing of the kind is alleged by respondents. See also testimony of Winkleback 72, Winters p. 46-51.

It is shown by the testimony that in order to obtain the amount paid to respondents, appellants expended upon the property about $14,000 more than the amount of the one-half gross proceeds retained by them under the contract, and this sum was expended by them before the property began to pay expenses. (Winters p. 45.)

And further, that when the contract was made, September 19, 1882, the property as it then appeared and in its then condition, was not worth to exceed $30,000, and a fair rental for it would have been not to exceed one-fourth of the gross proceeds. The large amount of one-half gross proceeds was agreed to be paid because by the terms of the agreement it was to be applied on purchase money. And the enhanced price of $40,000 was agreed upon because the defend-

ants had the right, under the contract, to apply one-half proceeds to its payment.

Kitto, p. 31-42; Winkleback, 70, 137-8; Winters. 42-52.

In this action the appellants having made a tender to respondents of $21,000, the balance with interest of the $40,000 purchase money, filed their cross complaint praying for specific performance of the contract. The delay in all after the 27th day of December, 1883, to the time of the tender and filing of the cross complaint was about six months.

Respondent Reeser, by his declarations and acts during the occupation of the premises by appellants, gave the appellants to understand that as long as they, the appellants, contin ued continued in good faith and diligence in the execution of the contract the time of performance montioned therein would not be strictly insisted upon, and that a reasonable extension would be granted. (Winters, p. 46-51.)

The foregoing facts are in most part admitted by the pleadings; and also established by abundant testimony.

I.

Upon the case as thus presented our contention is,

The contract was a mutual contract of sale.

1. A sale.

Plaintiff's only object was to obtain the forty thousand dollars. The contract contemplated possession and work by defendants in order to obtain the means of payment. It provided that one-half of the proceeds was to be paid and credited as purchase money. The one-half was far in excess of rental, and was agreed to by defendants solely because it was applicable to purchase money. The purchase by defendants of the Kitto lease, and the payment of one-half instead of one-third proceeds (which was the rental fixed in that lease) during the unexpired term, is inexplicable only on the supposition of a sale. If defendants entered as tenants on a rental or royalty of one-half proceeds, why should they retire by purchase a better lease, paying $5,000 therefor, when the ore in sight at that time yielded only $1,500? The supplemental agreement, Exhibit "C," places beyond controversy the fact that it was a sale in the contemplation of all the parties. By it the plaintiffs granted to defendants an extension of thirty days, or until December 27th, 1883, on the express condition that defendants agree to accept a deed for 1,367⅙ feet of the Idaho claim instead of 1,400 feet stipulated in the original contract, and to pay "interest at one per cent. per month on the balance of the purchase money from now until December 27th, 1883, or any time it is paid prior to that date."

2. It is a mutual contract; in no sense unilateral.

The defendants "covenant and agree" to enter into possession and to mine and extract ore so long as they find it profitable and to pay one-half proceeds on the purchase price. It was necessary to expend a considerable sum of money before defendants could ascertain that the mine could be worked profitably on those terms. "Worked profitably" in this connection must mean that the one-half reserved by defendants shall pay expenses. If it would then the other half, being applied on purchase money, the working is profitable.

The defendants agree to work and develop, in the first instance, at their own expense and took the chances of making the mine profitable. It was an agreement on their part which made the contract mutual.

There is nothing in this instrument denoting that the purchase is optional, or that any future election on defendants' part as to that, is to be exercised. The only uncertainty was would the defendants be able to complete the payments within the time limited? But full payment was not made a condition precedent to the existence of the contract. The contract is executed by both parties under seal—a mutuality of obligation.

If anything were wanting the statements of the plaintiffs made pending the contract, show that they regarded it as a sale.

See among others, the testimony of Kelly, Transcript pp. 54–56; of Kitto, Transcript pp. 39–40.

Winters testifies, (Transcript p. 44): "We took possession as purchasers, negotiated as purchasers and made payments on the price as purchasers."

Ganahl, pp. 134–7.
Winkleback, pp. 137–9.

The phraseology of a lease was only the form of the undertaking for delivery and assurance of possession.

It is immaterial that the parties call the contract a lease if it shows a sale was intended. The intent is to be gathered from the whole instrument, and when so ascertained it is to be carried out through the name given to it and particular clauses tend to show a different intent.

Chase vs. Bradley, 26 Me., 331.
Merrill vs. Gore, 29 Id., 246.
Warren vs. Merrifield, 8 Met., 96.
Bird vs. Hamilton, Walk Ch., 368.
Dubuque vs. Dubuque, 7 Iowa, 275.
Salmon Falls Co. vs. Portsmouth Co., 46 N. H., 249.
Herryford vs. Davis, 102 U. S., 235, 243-4.
Nightingale vs. Barnes, 47 Wis., 389.
Jamaica etc. vs. Chandler, 9 Allen, 167, 166-8.
Miller vs. Steen, 30 Cal., 403.
Diggle vs. Boulden, 48 Wis., 477, 485.

Manifestly the contract was not intended to be a lease for no rent is provided for, and if the contract was carried out there would be no surrender and there was no reversion in the plaintiffs, and it runs to heirs and assigns.

Mutuality is not wanting merely because the extent of performance on one side is subject to a contingency. Such a contingency may excuse performance in part, or eventually defeat the object of the contract, but it will not make it unilateral. It might be improvident for the defendants to agree to work the mine and take the chances of paying the $40,000 out of one-half the ore, even with the privilege of making up any deficiency with other money, but if they were satisfied so to contract, they had a right to do so, and their undertaking would be a good consideration for the other parties' agreement to sell. Such an agreement is a mutual agreement.

Being a contract of sale, all the consequences based on the proposition that it is a lease, fall to the ground.

Mutuality of obligation and remedy must exist when the decree is made; it need not exist before if there is a valid contract.

A covenant to convey on payment of a sum of money (like the ordinary bond to convey) is binding, and will be specifically enforced on acceptance of the

one to whom the covenant is made, although by the terms of the contract he does not bind himself to pay the money.

Pom. Spec. Perf. Sec. 167 note 1, Sec. 166, 169. note 1.
Corson vs. Mulvaney, 49 Pa. St. 88.
Willard vs. Tayloe, 8 Wall, 557.
Ewings vs. Gordon, 49 N. H., 444.
Barnard vs. Lee, 97 Mass., 92.
14 Pa. St., 112.
26 Pa. St., 249.
10 Nev., 355.
Pom. Spec. Perf. Sec. 168, note at pp. 236-7.

II.

The next inquiry is, are the defendants entitled to a decree of specific performance of the contract of sale.

They are if they have complied with its terms.

If they have not complied with its terms, still they may be entitled to specific performance if their apparent default has been waived by plaintiffs.

1. Is time of the essence of the contract? Not by its terms; and there is nothing in the subject matter or nature of the contract to make it so. It provides for a sale of real property and payment of money. If there has been a default it is not alleged or pretended that plaintiffs have suffered any damage by the delay of payment which interest would not compensate.

And the supplemental contract, Exhibit C, shows that plaintiffs have and do consider interest as compensation for delay in payment of the purchase money.

"When time admits of compensation," says C. J. Gibson, "as it perhaps always does when lapse of it arises from money not having been paid at a particular day, it is never an essential part of the agreement."

Feay vs. De Camp, 5 S. & R., 322, 12 Pa. St. 283, 290.

Time is not ordinarily in equity of the essence of contracts for the sale of land.

1 Story's Eq., Sec. 776.
Longworth vs. Taylor, 14, Pet. 172.
Pritchard vs. Todd, 38 Conn., 413.
Waters vs. Travis, 9 John, 450.
Sharp vs. Trimmer, 9, C. E. Green, 422.
Young vs. Daniels, 2 Iowa, 126.
Hall vs. Delaplaine, 5 Wis, 206.
Roder vs. Neal, 13 W. Va., 374.
White and Tudor, L., Cas. in Eq., 1110, 1111.
Waterman on Spec. Perf., Secs. 462, 466, 467.
Id. 458, p. 629, n. 1. Sec. 461, p. 635, Sec. 463, 471.
Pom. on Spec. Perf., Secs. 392, 376.

To take a case out of this general rule the parties must plainly stipulate in a proper case that time shall be of the essence of the contract, or there must be something known in the circumstances of the parties or something in the nature of the property to make it so.

It is not enough that the parties have mutually agreed that their respective acts shall be done at or before a day named, or that the defendants' undertaking is in the form of a bond, and the condition requires certain acts to be done after or contemporaneously with some act to be done by the obligee.

Steele, vs. Branch, 40 Cal., 3.
Moole vs. Seriven, 33 Mich., 500.
Gibbs vs. Champion, 3 Ohio, 335.
D'Arras vs. Keyser, 26 Pa., St. 249.
Edgerton vs Peckham, 11 Paige, 352.
Hall vs. Delaplaine, 5 Wis., 206.
DeCamp vs. Crame, 19 N. J., Eq., 166, 5 S. & R., 323.

The contract provides for payment on or before a given day, but expressly stipulates that the defendants will upon default in payment surrender possession to the vendors "upon demand, claiming their right to re-enter." Thus the plaintiffs reserve to themselves the option to end the contract by making demand, or to continue it in force by making no demand. In such cases the vendor cannot treat the default alone as terminating the contract, but he must give prompt and unequivocal notice and make demand

Pom, Spec. Perf., Secs. 393, 378, 379, 380.
Miller vs. Steen, 30 Cal., 403.
DeCamp vs. Feay, 5 S. & R., 323.
Wells vs. Smith, 31 Am. Dec., 278 note.
Edgerton vs. Peckham, 11 Paige, 352.
Leard vs. Smith, 44 N. Y., 618.
Clark vs. Lyon, 35 Ill., 105.

As interest is generally ample compensation for delay in payment of money, any stipulation, which, if literally carried into effect, would give very much more, will be treated as a penalty and disregarded.

Pom. on Spec. Perf., Sec. 374 and note, 392, 332, 380, 381, 248 and note.
2 Story's Eq., Secs. 1314, 1315.
1 Pom. Eq., 450, 40 Cal. 3.
2 White and Tudor, L., case in Eq., 1134.
Barnard vs. Lee, 97 Mass., 92.
Jones vs. Robbins, 29 Me., 351.
Knott vs. Stephens, 5 Oregon, 239, 240-1.

This contract contains stipulations of various degrees of importance—to pay the purchase money, to work the mine in a miner-like manner, to keep it clear of liens, stipulations as to milling and cleaning up ores, receipting for bullion — minute directions as to the manner of doing all these things; and it expressly provides for surrender and re-entry on failure of the defendants to comply with any of its provisions, however slight and unimportant. Such a provision is uniformly treated in all jurisdictions as a penalty, and the party, although in default, will be relieved from the effect of the clause and from the forfeiture.

Pom. on Spec. Perf., Sec. 391-2.
2 White and T. L. cas. in Eq., 2063, 1134, 2044.
Kemble vs. Farren, 6 Bing., 141.
Nevil vs. Rossman, 18 Barb. 50.
Beary vs. Wisdom, 3 Ohio., St. 244.
Shreve vs. Brereton, 1 P. F. Smith, 175.
Richmond vs. Robinson, 12 Mich., 193.

Land Co. vs, Perry, 23 Kan., 140.
1 Pom. Eq., Sec. 450, 451.
2 Story's Eq., Secs. 1314, 1315.
Steele vs. Branch, 40 Cal. 3.
Barnard vs. Lee, 97 Mass., 92.
Henry vs. Tupper, 29 Vt., 36.
Remington vs. Irwin, 14 Pa., St. 143,

A court of equity always relieves against a forfeiture for breach of condition subsequent when such breach is involuntary and not wilful.

Pom. Spec. Perf., Secs. 334, 335, 336.
Waterman's Spec. Perf., Sec. 437, 466 and note p. 643, Sec. 467.

Making full payment by the day named in the contract, if a condition at all, is a condition subsequent; for it did not necessarily preceed or accompany the vesting of the estate.

Pom. Spec. Perf., Sec. 338.
Underhill vs. Saratoga R. Co., 20 Barb., 455.

This contract on its execution vested in the defendants an equitable interest and estate in the contracted premises; for by and under the contract they were let into possession. They developed and improved the property, largely increased its value, and paid a large sum on the purchase price, and this before the day fixed for final payment.

Pom. on Spec. Perf., 334, 335, 336, 337, 339, 379, 381 and note 494, 404, 334, 335, 314, 15.
2 White and Tudor, L., cas. in Eq., 1134.
Wells vs. Smith, 31 Am. Dec., 278 and note.
Ewing vs. Gordon, 49 N. H., 444.

Bernard vs. Lee, 97 Mass., 97.
21 Wall, 309; 11 Paige, 352.
O'Fallon vs. Kennerly, 45 Mo., 127-8.

The same is true when the contract gives to the vendee merely an option to purchase. The estate vests subject to be divested afterwards by omitting to exercise the option, which would be a condition subsequent.

Ely vs. Beaument, 5 S. & R., 124.
Kerr vs. Day, 14 Pa., St. 112, 114-16.
Maddock vs. Astbury, 32 N. J., Eq. 181, 183.

The argument that the nature of this property is such as to make time for the payment of the money essential, independently of the intent and agreement of the parties, seems to us wholly without foundation.

The changes in the value of the property during the period of the contract are within the contemplation of the parties in making the bargain. The vendee must bear all loss from depreciation, and is entitled to the gain if the value is increased.

Pom. S. P., Sec. 322 and note 1.
Willard vs. Tayloe, 8 Wall., 558, 571.
Pom. S. P., Sec. 384, p. 455, note 2.

If the vendee should lie by and delay to take advantage of fluctuations a court would infer bad faith. But if so large a part of the purchase money has been paid that the vendor could not suffer a loss from any fluctuations in the price, the doctrine would not apply.

McLaughlin vs. Shields, 12 Pa., St. 283.

The conduct of the defendants under the contract, their steady work, their payments, efforts to raise the money by re-sale, the developments of ore, the large and steady advance in the value of the property caused thereby, preclude the supposition of any intention on their part to abandon the contract. They made no pause—manifested no hesitation—were eager to complete the purchase, relying on the repeated assurances of plaintiffs of indulgence in the matter of time. They were diligently and expensively pressing the work and their negotiations for a re-sale.

A gold mine is of more stable value, less liable to fluctuations from extrinsic causes than even agricultural land. The idea that specific performance will not be decreed of a contract of sale of mining property rests upon the authority of some English cases cited in Pomeroy's Specific Performance, section 385, page 457, note. No American case is cited to support it. The application of such a doctrine to a country like Idaho and the adjacent States and Territories, where the chief pursuit of the people is mining, and where the bulk of the property is mining property, would be ruinous.

Felger vs. Coward, 35 Cal., 650.

III.

But even if time had been originally of the essence of the contract, the plaintiffs waived its essentiality by extending it, by assurance of indulgence, by recognition of the contract after the time fixed for consummating the sale, and by failing to qualify themselves to convey according to the agreement.

The 27th day of December, 1883, was a day fixed for two things to be done—payment by the defend ants, and delivery of a deed by the plaintiffs. Neither of them acted on that day; neither sought the other prepared to fulfill, offering to fulfill, and demanding of the other their concurrent act. Both parties resided in the same town. Prompt payment is required for the benefit of the payee, and if he must do something at the same time to enable him to receive it, and he does not put himself in readiness to receive it by doing that act, he waives the benefit of having the money at that time, and is treated as having prevented the payment. Performance or an offer to perform is a condition precedent to the right of either party to insist upon performance by the other.

Leard vs. Smith, 44 N. Y., 618.
Barron vs. Frink, 30 Cal., 488.
Hill vs. Griggsby, 35 Id., 656.
Crabtree vs. Linings, 53 Ill., 526.
Swan vs. Denny, 22 Pick., 485.
Campbell vs. Gittings, 19 Ohio, 347.

Barbee vs. Willard, 4 McLean, 356.
Warren vs. Wheeler, 21 Me., 484.
Howe vs. Hunting, 15 Id., 350.
Smith vs. Lewis, 26 Conn., 110.
Leonard vs. Bates, 1 Blackf., 122.
Jones vs. Marsh, 22 Vt., 144.
2 Chitty on Cont., 1084 and note.
Miller vs. Smith, 65 Mo., 315.
Brasswell vs. Pope, 82 N. C., 62.
Johnson vs. Jackson, 61; Am. Dec., 522.

By thus allowing the day fixed in the contract to pass, the parties consented to the continuance of the contract in force, each having a reasonable time to perform, but either could by notice fix an essential time. Neither party exercised this right. Without reasonable notice fixing a time, a sudden announcement by either party that the contract is ended would have no effect whatever.

The plaintiffs could not by a sudden demand after the day put an end to the rights of defendants. They made this sudden demand by bringing this suit, and and took possession, depriving defendants of the power of fulfilling—taking away the rich ore which they admitted was in the mines.

Murphy vs. Lockwood, 21 Ill., 611.
Peck vs. B. Co., 69 Ill., 204, 205.
Allen vs. Woodruff, 96 Ill., 11, 20.
Walters vs. Miller, 10 Iowa, 426. 8 Ohio, 201.

The continued existence of the contract was recognized by plaintiffs on the 29th of December, 1883, two days after the plaintiffs say it expired, by their

receiving $948.96 on the purchase money. It was paid after the alleged default, and received by the plaintiffs without notice, protest or warning, or any intimation that they considered the contract at an end. This was acquiescence, waiver.

After the 27th of December, 1883, the defendants continued to work the mines, expending $2,000 in labor and supplies, making extensive developments and improvements, discovered and opened about January 20th, 1884, a new and valuable body of ore, mined out and filled the bins with ore from this body, continued to mill their ore at Reeser's mill. Reeser knew all this and made no objection, gave no notice or warning, but encouraged it. He gave the Cavanaugh extension. Settle knew it, must have known it from Reeser, with whom he was then in correspondence, and he made no objeetion, gave no notice or warning.

"The acquiescence of the vendor in the efforts of the vendee to perform after the day, or in expenditures made by the vendee for that purpose, or in receipt of moneys paid in part performanc after the day, or if he does anything to deceive or mislead the vendee, he is estopped from insisting on forfeiture."

Pom. Eq., 451.
Wharton on Cont., 890.
Lounsbury vs. Beebe, 46 Conn., 291.
Ahl vs. Johnson, 20 How. U. S., 520, 519-22.
Longworth vs. Taylor, 14 Pet., 176.
Green vs. Finn, 35 Conn., 182-3.

Pritchard vs. Todd, 38 Conn., 413.
Remington vs. Kelly, 7 Ohio, 103.
Ashmore vs. Evans, 11 N. J. Eq , 151.
Laverly vs. Hall, 19 Iowa, 526.
Ewing vs. Gordon, 49 N. H., 460-1.
Williston vs. Williston, 41 Barb., 635.
Fallon vs. Kennerly, 45 Mo., 127.

Kitto testifies (Transcript p. 41) that defendants worked all through January and to the 11th of February--seventeen men to January 5th and five men from then to February 11th. Of this reduction of force Reeser said to Winters, "You are working right, now." (P. 47.)

As to expenses for wages and supplies amounting to $2,000 in January and February, 1884, see Winters and Kitto (Transcript p. 51, 41).

The payment of $948.96 on December 29th, 1883, on purchase money, is admitted in the pleadings, being alleged by the defendants and not denied.

Also admitted in pleadings that defendants' work and expenditures after December 27th were with the knowledge and without objection from plaintiffs. (See amended cross complaint and answer thereto. Also testimony of Winters.)

Winters testifies that in January, 1884, Reeser gave us every encouragement to go on, my room was his headquarters, very friendly and cordial. (Transcript, page 46-7.)

Reeser always encouraged us to go on, saying we would have time to work out. (Transcript p. 46, 49.)

The day before Reeser went to Boise, January 22, 1884, he said he was going to look out for my and his interest and see that Settle did nothing to injure us. (Transcript p. 49, 50.)

Reeser authorized the Cavanaugh extension in January. (Winters, Transcript p. 48.)

About January 30th, crushed thirty tons of ore at Reeser's mill. (Transcript p. 50.)

The ore was milled and handled in all respects as prescribed by the contract. (Pleadings.)

Settle said to Vineyard that if defendants paid $15,000 or $20,000 within the time, it would show that they could pay for the property, and he would give them further time.. (Vineyard Trans, 57-58.)

In December, 1883, Settle said to Waldron he had made sale of the property, would be glad to have it consummated, and was willing to give time, and seemed anxious to have the sale go on. (Transcript p. 58-59.

In November, 1883, Reeser said to Waldron, he hoped defendants would raise the money. He was very friendly to defendants, and willing to give any

reasonable time. (Trans. p. 59. See also the testimony of Winkleback, etc., new ore body. Reeser saw it, 37-8.)

But another and conclusive reason exists why the plaintiffs could not put an end to the contract on the assumption that defendants were in default. The plaintiffs were not able to made the required conveyance.

There had never been a time after the making of the contract when plaintiffs could execute such a deed as they agreed to deliver. There have always been defects in the title, and encumbrances on the property. Their undertaking was to convey all the properties described in the contract, by good and sufficient deed, free and clear from all encumbrances. This they have not been able to do at any time.

The defendants were entitled to a deed which would convey a perfect indefeasible and unincumbered title.

Waterman on Spec. Perf., 414, 419 and note, see 436.
Burwell vs. Jackson, 9 N. Y. (5 Seeden) 536.
Fletcher vs. Barton, 4 Id., 400.
Delavan vs. Duncan, 49 Id., 485.
Porler vs. Noyes, 2 Greenlf, 22.
Brown vs. Gammen, 14 Me., 276.
Abendreth vs. Granwich, 29 Conn., 356, 364.
Stow vs. Stevens, 8 Vt., 27.
Strick vs. Riera, 16 Wis., 273.
Parker vs. McAllister, 14 Ind., 12.
Owings vs. Baldwin, 8 Gill., 337,

Pom. on Spec. Perf., sec. 364.
Id. 348 and note 1, p, 423, sec. 381. 337.
2 Wheaton, 290.
1 Peters, 455.

The following defects and incumbrances exist upon the property:

First. A mortgage on the Vishnu claim for $7,372.50, and interest executed by plaintiff Reeser to one Pfeifer. (Transcript pp. 50-51.)

Second. Five feet undivided of the Idaho, belonging to John Dunlay. (Transcript, p. 51.)

Third. The fee to all to all the property was in the government, and not even a possessory title to any of it was in plaintiffs, except the Idaho and Vishnu. (Transcript, p. 51, 14.)

The existence of the mortgage is admitted in the pleadings. (See amended cross complaint and answer thereto.) There is no evidence that plaintiff ever offered to release it.

IV.

But even if the plaintiffs' theory of the contract were accepted and considered in connection with the established facts, the result would be the same. The plaintiffs allege that the agreement between the parties was, that defendants should have a lease of the premises to expire on the 27th day of November, 1883, and should pay a rent or royalty of one-half the proceeds therefor, and should have an option to purchase the premises at any time, on or prior to said date, for the sum of $40,00, less the rent theretofore paid. And upon failure to make such payment on or before such date, defendants should at once and forever forfeit all right to said premises, and to the possession thereof, and at once surrender the premises to plaintiff. (See plaintiffs' answer to cross-complaint.)

In connection with this version of the contract take the undisputed facts of the case as given at pages —— of this brief.

Now the payment of one-half proceeds being far in excess of rental, and by the terms of the contract to apply on purchase money, was, especially as defendants were not bound by the contract to work or real-

ize any proceeds, properly considered the declaration of defendants' option to purchase from the first payment. It could not have been paid simply as rent, but only because it also formed a part of the purchase money. A binding contract of sale existed therefore from the first payment. But if this be denied, it must be conceded that from November 24, 1883, the date of exhibit "C," the contract of sale existed, for the payments made and to be made are therein designated purchase money, and defendants thereby agree to pay interest on the balance of the purchase money, and there is nothing in the contract which makes payment in full a condition precedent to the existence of a contract of sale. The contract being in existence then from November 24, 1883, can defendants claim the benefit of that contract?

The defendants did not pay on the 27th of December, 1883, the termination of the thirty days undisputed extension, and defendants took no steps to enforce their asserted right to a specific performance until on the —— day of June, 1884, they filed their original cross-complaint in this action which was commenced February 6th, 1884, in which cross-complaint they pray for a specific performance against plaintiffs. Before filing they made a tender of the balance of the purchase money with interest, which is pleaded in the cross-complaint. Here is a delay of six months: which must be excused by defendants.

Against this delay, and as excusing it, we have the continued possession of the defendants down to the commencement of this action in February, 1884. Delay does not operate against a purchaser in possession.

But this possession must have been as purchaser, not as tenant, and the vendor must have known, or have been bound to know, that the defendants claimed to be in possession as purchaser under the contract of purchase.

Now the payments of defendants possessed a two-fold quality—if as contended by plaintiffs they were rent, they were also purchase money by the express terms of the contract. The amount of the payments was fixed at one-half proceeds because they were made applicable to the purchase money. Simply as rental, they could not have exceeded one-fourth. So that in making those payments the defendants believed justified by the terms of the contract as stated by the plaintiffs themselves, that they were not merely paying rent, but also obtaining a credit on the purchase money.

But let us say, if the plaintiffs will have it so, that at first the payments were not actually applied to purchase money, still they had that potential quality—they might be so applied—it was within the contemplation of the parties and within the terms of the contract as

as stated by plaintiffs, that they could be so applied, And now, when we look at exhibit "C" we find that at that time they were, in point of fact, so applied by all the parties to this cause. The evidence of this fact exists in the written language of exhibit "C" under the hands and seals of all the parties. It is a fact which is not controverted, and it is not pretended that exhibit "C" is tainted by any fraud or misrepresentation, or that it does not set forth the exact intention of the parties. In that exhibit the defendants agree to accept a deed for a less number of feet and to pay interest on the balance, not of the rent, but of the purchase money, and it was expressly in consideration of their agreement to do these two things that plaintiffs granted the extension of thirty days.

So that if not from the date of the first payment of one-half proceeds, still certainly and beyond all controversy, from November 24th, 1883, the date of exhibit "C," the defendants claimed to be purchasers, owing not rent, but purchase money. From that date defendants claimed to be, and were, in possession as purchasers, and the plaintiffs knew and admitted it as a fact. It was conceded by the terms of exhibit "C" that from that date defendants were liable only for purchase money and interest.

In addition to mere possession the defendants expended upon the property, in developing and improv-

ing it, after December 27th, 1883, with the knowledge and without the objection from either of plaintiffs, not less than $2,000. Being in possession as purchasers, the improvements and expenditures were made as purchasers, and thereby an additional body of valuable ore was discovered in the mine. The same remarks apply to the milling of ore at the Reeser mill in January, 1884.

In addition to possession and improvements, defendants on the 29th of December, 1883, after their alleged default, paid to the plaintiffs $948.96, and plaintiffs received and receipted for it. Being then in possession as purchasers, defendants paid and plaintiffs received this sum on the purchase money, for only purchase money was due to plaintiffs.

And in addition to possession, improvements and payments after the day as purchasers, the plaintiffs, by reason of the mortgage on the Vishnu and other defects of title, were and have always been, unable to comply with the contract on their part by conveying a good and unincumbered title to the property.

The defendants' apparent delay of six months is therefore amply excused.

First—By their possession and improvements as purchasers after the day of their alleged default, with the knowledge and without objection from the plaintiffs.

Second—By their payments as purchasers after the day upon purchase money.

Third—By the inability of the plaintiffs to comply with the contract by conveying an unincumbered title.

Fourth—Over one-half of the purchase money had actually been paid, and the balance was standing on interest.

The plaintiffs in their complaint alleged that it was part of their agreement that if the defendants failed to pay the agreed price of $40,000, less the rent theretofore paid on or before said date, defendants should at once and forever forfeit all right to said premises and to the possession thereof, and at once surrender the possession to the plaintiffs. If it be granted that this was the agreement, will it be contended that equity will not relieve against a forfeiture, incurred under such circumstances arising from a delay so amply excused. If equity were powerless to give relief in such a case, it would little deserve the eulogiums which have been pronounced upon it.

Pom. Spec. Perf., Secs. 381, 337, 404 and note 2, 3, page 276.
Edgerton vs. Peckham, 11 Paige, 352, 359.
Potter vs. Tuttle, 22 Conn., 512—See terms of contract.
Wallace vs. McLaughlin, 57 Ill., 53.
Ewing vs. Gordon, 49 N. H., 460
Stewart vs. Cross, 66 Ala., 22, 28.
96 Ill. 20, 46 Conn. 293-4.

House vs. Beatty, 7 Ohio.
Hoag vs. Owen, 60 Barb., 34.
Willard vs. Tayloe, 8 Wall., 557.
Barnard vs. Lee, 97 Mass., 92
14 B. Mon., 293.
14 Mich., 109.
9 C. E, Green, 422.
2 N. H., 163.
96 Ill., 20.
46 Conn., 293-4.
Waterman Spec. Perf., Secs. 477 note 2, 478, 480, 479. p. 673, 481, 482, 483, option contracts Sec. 200 and p. 670. n. 3.
Schroeder vs. Germeinder, 10 Nev., 355,

Without considering in detail the various assignments of error (Trans. p. 179-182), the subject matter of which has perhaps been sufficiently discussed already, we remark in conclusion, that the findings of the Trial Court which were adopted by the Supreme Court of Idaho, besides being wholly inadequate as a statement of the facts of the case, and in many particulars contradicted by the admissions contained in the pleadings, are also vitiated by the erroneous assumption that the contract, Exhibit "A," is a lease and not a contract of sale. And such as they are they do not warrant the judgment. On the contrary, taken in connection with the other conceded facts of the case, they authorize and require a decree in favor of the appellants in accordance with the prayer of their amended cross complaint.

Respectfully submitted.

M. KIRKPATRICK,
Attorney for Appellants.

IN THE

Supreme Court of the United States.

October Term 1889.

JOHN B. WINTERS,
FRANK GANAHL and
JOHN WINKELBACH,
Appellants,
vs.
GEORGE F. SETTLE
and JACOB RESSER,
Appellees.

No. 96.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

BRIEF FOR APPELLEES.

By SAMUEL SHELLABARGER and
JEREMIAH M. WILSON.

THOMAS MCGILL & Co., Printers, Washington, D. C.

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Supreme Court of the United States.

October Term, 1889.

JOHN B. WINTERS, FRANK GANAHL, and JOHN WINKENBACH, Appellants,
vs.
GEORGE F. SETTLE and JACOB RESSER, Appellees.
No. 96.

Appeal from the Supreme Court of the Territory of Idaho.

Brief for Appellees, by Samuel Shellabarger and J. M. Wilson.

The action below was commenced in the District Court of the Second Judicial District of the Territory of Idaho (R., 1) by the appellees, George F. Settle and Jacob Resser, against John B. Winters, Frank Ganahl, and John Winkenbach, defendants, by petition filed February 4, 1884 (R., 8), the scope and object of which was to restrain the defendants from entering on or interfering with the possession of the mining property described in the bill, or extracting ores from the mines, or removing the same; and for an accounting concerning ore taken out of the mine by them; such accounting to be pursuant to obli-

gations created by Exhibits "A," "B," and "C," attached to said petition. (R., 4 to 7, inclusive.)

The facts in the case were found by the court pursuant to a stipulation. (R., 20, fol. 52.)

On the 21st of February, the defendants below, appellants here, demurred to the petition (R., 8), and the same was overruled at the June Term, 1884. (R., 9.)

An amended answer was filed by defendants on July 8, 1884. (R., 9 to 12, inclusive.)

A cross-amended complaint was filed, by defendants below, July 8, 1884 (R., 16), praying for a specific performance of what they call "a contract of purchase," as embodied in said exhibits "A," "B," and C." (R., 12 to 16, inclusive.)

The answer by the present appellees to the said cross-complaint was filed July 18, 1884. (R., 16 to 20.)

On the 27th of January, 1885 (R., 20), the parties, by their counsel, entered into a written stipulation, agreeing, in substance, that the questions of law and fact should be found by the judge, and judgment rendered thereon, at a term named in the stipulation, &c.

The law and the facts found by the court are embodied in the record, at pages 21 to 24, inclusive, the findings being dated April 18, 1885.

The judgment of the District Court was rendered on the 28th of May, 1885. (R., 25, 26.)

The judgment embraces said findings of fact and conclusions of law, and makes the same a part of said judgment; and, on them, the court decrees that the defendants be perpetually enjoined from interfering with the mining property described in the complaint; that the complainants are entitled to an accounting with the defendants concerning the ore taken from said mines, and refers the matter to A. L. Richardson, Esq., clerk of the court, to take the account; and further orders that the defendants take nothing by their cross-complaint and

amended cross-complaint, and orders them dismissed; and that the defendants are not entitled to any restraining order, restraining the plaintiffs from the enjoyment of said mining property pending the appeal that might be taken, and that plaintiffs recover costs.

A motion for new trial was submitted by the defendants, stating, *in extenso*, the grounds of the motion, which was overruled. (R., 26 to 30, inclusive.)

The "statement on appeal" begins on page 30 of the Record, and states that, the parties consenting thereto, the action on the original and cross complaints was tried before the judge at chambers, and was had without a jury; and that the following proceedings and testimony were taken on the trial; that the testimony introduced by the plaintiffs was Exhibits "A," "B," and "C;" and, thereupon, plaintiff rested.

The said "statement on appeal" then proceeds to give the oral evidence delivered on behalf of the defendants, which extends to page 153 of the Record; and is certified to on the 29th of May, 1885, by Broderick, district judge.

On appeal of the case to the Supreme Court, that court affirmed the judgment of the District Court, this on the 5th of March, 1886. (R., 158.)

The defendants below applied to the Supreme Court to make a set of "special findings," numbered from one to twenty, beginning on page 170 and ending on page 177 of the Record, which was refused by the judge, for reasons set forth in the order entered the 6th of March, 1886 (R., 177), where the court says:

"The court refuses to make said findings, or any of them, for the reason that the case was tried before the District Court without a jury, and on findings of fact and conclusions of law duly filed therein; and the judgment has been affirmed by the decision of this court, and by such affirmance such findings are adopted by this court, and furnish a sufficient statement of the facts in the case."

A repetition in this brief of the facts as found by the court is unnecessary, because they are conveniently and fully accessible in the Record, pages 21 to 24.

Any additional statement of facts required for the purposes of this brief will be stated as the argument proceeds.

We shall in the main make this brief a reply to the positions of the brief for the appellants.

The statement of the first position of the appellants begins at bottom page 12, and is one wherein they insist that, since the evidence at large is brought into the record, and since the court below did not find as to certain facts, which appellants allege were material, and not passed upon, or covered, by the findings of fact below, therefore, this court shall review the entire body of the evidence set forth in the "statement for appeal," and find the facts according to the contention of the appellants.

Appellants say (on page 3 of their brief) that this court must make these special findings, notwithstanding the provisions of the act of Congress of April 7, 1884 (18 Stats., 27, 28), which authorizes the abolishment of the distinction between chancery and law practice, and provides—

> "That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and, also, rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

The reply to this position of counsel, urging that you must retry the facts in this case, because the judge refused to find certain facts wanted by the appellants, and that, hence, injustice will result if you fail to go through the evidence and pass upon said omitted facts, is obvious and conclusive.

The appellate jurisdiction of this court being such as is prescribed by statute, and no other or greater, you were early after the enactment of said act of April 7, 1874 (18 Stats., 27), brought to the determination of the question what appellate powers are conferred by said act of April 7, 1874.

The first case in which this question arose was Stringfellow *v.* Cain, 99 U. S., 610, where you held—

(1) That in a case not tried by a jury your appellate jurisdiction can only be exercised by appeal.

(2) That the Supreme Court of the Territory, on such appeal, was called upon to decide whether the evidence, disclosed by the "statement for appeal," was sufficient to sustain the findings of fact, and, if it would, whether they (the findings of fact) would support the judgment.

(3) That if the Supreme Court of the Territory reversed the judgment because the evidence does not sustain the findings, other findings must be made, before the case can be put in a condition for hearing in the Supreme Court of the United States; but if it has all the evidence which could be considered below—should the case be remanded—the Supreme Court of the Territory can state the facts established by the evidence, and render a judgment. On appeal to the Supreme Court of the United States, the case, if otherwise properly here, will be determined upon the facts so stated.

(4) That if the findings of the District Court be sustained, and its judgment affirmed, or if its judgment be reversed for the reason that the findings are not sufficient to support the judgment, such findings are, in effect, adopted by the Supreme Court of the Territory, and they, (the facts so adopted by the Supreme Court of the Territory), for the purposes of an appeal to the Supreme Court of the United States, furnish a sufficient statement of the

facts of the case within the meaning of the act of April 7, 1874.

Here, then, you explicitly held, that before this court can try a case on appeal, under this statute, there must be a finding of facts by the Supreme Court of the Territory, either by its own finding on review of the testimony, or by its "*adoption*" of the findings of the District Court; which findings, in this court, furnish the *only* facts that can be looked to as the basis of the judgment or decree of this court; that you are here, on such appeal, confined to the facts established by the findings of the Supreme Court of the Territory, and can make no findings of your own based upon testimony embodied in the statement for appeal.

The next case in which this statute came into notice in this court, as to what facts you can consider here, is that of Neslin *v.* Wells, 104 U. S., 428.

Upon this point, in the opinion by Matthews, Justice, in that case, this court says:

"Under the second section of the act of Congress of April 7, 1874, c. 80 (18 Stat., pt. 3, p. 27), concerning the practice in territorial courts and appeals therefrom, as explained in Stringfellow *v.* Cain (99 U. S., 610), the present appeal rightly brings into review the decree of the territorial Supreme Court, affirming the decree of the District Court; but we are *not at liberty* to consider *anything*, as embraced in the statement of the facts, required by the statute, *except the special findings* of the District Court, adopted by the Supreme Court in its general judgment of affirmance. This excludes the consideration of the exceptions taken in the District Court in the course of the trial, and noted in the statement filed in that court as the basis of the motion for a new trial, and leaves, as the *sole* question for determination here, whether the *facts, as found, justify the decree sought to be reversed.*"

Here you explicitly decide the exact point now under consideration, where you say:

"The present appeal rightly brings into review the decree of the territorial Supreme Court, affirming the decree of the District Court; but we are *not at liberty* to consider *anything*, as embraced in the statement of facts required by the statute, *except the special findings* of the District Court adopted by the Supreme Court in its general judgment of affirmance."

The same thing is reaffirmed by this court in Davis *v.* Fredericks, 104 U. S., 619.

The same thing is, if possible, still more explicity repeated in the case of Hecht *v.* Boughton, 104 U. S., 236, where this court says, regarding the effect of this statute:

"This statute seems to us conclusive of the present motion. In allowing legal and equitable remedies to be sought in the same action before the territorial courts, Congress saw fit to establish an *inflexible rule* by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by jury should come on writ of error and all others by appeal. This makes the former proceeding depend on the single fact of whether there has been or not a trial by jury. (Stringfellow *v.* Cain, 99 U. S., 610.) *We are not to consider the testimony in any case.* Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and, upon an appeal, to *the statement of facts* and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. Under these circumstances, the former proceedings to get a review is not of so much importance as certainty about what is to be done."

Here you again repeat that—

"*We are not to consider the testimony in any case.* Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record, and, upon appeal, to the *statement of facts certified by the court below.* The facts set forth in the statement which must come up in the appeal *are conclusive on us.*"

This act of April 7, 1874, was again similarly interpreted in the case of Grey *v.* Howe, 108 U. S., 13.

There this court, referring to the said act of April 7, says:

"Since the act of 1878, *supra*," [mistake, 1874 is the statute named, *supra*,] "*the evidence at large is not be transmitted here from the courts of the Territories;* but, in lieu of the evidence, 'a statement of the facts of the case, in the nature of a special verdict.' In Stringfellow *v.* Cain, 99 U. S., 610, it was held, if the findings of the District Court were sustained, and a general judgment of affirmance rendered in the Supreme Court, the findings of the District Court, thus approved by the Supreme Court, would furnish a sufficient statement of facts for the purposes of an appeal to this court."

Again, in Eilers *v.* Boatman *et al.*, 111 U. S., 357, the same thing is repeated by this court in the following words:

"By chapter 80 of the act of Congress approved April 7, 1874 (18 Stats., 27), this court is *required to accept the findings of fact by the Supreme Court of the Territory as true on appeal to this court.* (See Stringfellow *v.* Cain, 99 U. S., 610; Hecht *v.* Boughton, 105 U. S., 235.)"

These cases, now gone over with unnecessary fullness, establish, beyond all question, the proposition that this court is without power, under said statute, to look outside of the facts found by the Supreme Court of the Territory.

There is no power to embody in the statement for appeal, or otherwise, the evidence at large, and its embodiment is wholly unauthorized by law.

The point here presented is not one where this court, on appeal, can exercise a discretion, as to departing from the findings of fact affirmed by the Supreme Court of the Territory, and placed in the record; and all contentions to the contrary are conclusively overruled by the cases to which we have pointed.

Again, the "*hardship*," and failure of justice, which is

pointed to in the opposing brief (p. 3, *et seq.*), which would result if you refused to find the facts, from the evidence at large, which are wanted by appellants, are imaginary.

If the findings of fact asked for are refused, because, in the opinion of the court, the evidence does not warrant the demanded finding, then the "hardship" is the hardship of a litigant suffering a judicial defeat in the courts, and this can hardly be said to be an unusual "hardship."

If the case put by opposing counsel, of refusal by the judge to find, is a case where he palpably refuses to pass upon a body of evidence admitted, as competent, by the court, and to find *one way or the other* on a set of material facts, then the complaining party has the easy remedy; one which is administered by this court as against all inferior and derelict courts over which it has supervision, to compel action, *one way or the other*, by the inferior court, to wit, through *mandamus*.

Ex-parte Railway Co., 101 U. S., 711.
Ex-parte Newman, 14 Wallace, 152.
Ex-parte Morgan, 114 U. S., 174.
Virginia *v.* Rives, 100 U. S., 313.

What we have now said is, according to our own apprehension, at least, so clearly and absolutely conclusive of the point, that this court can look for no facts, nor consider any evidence, outside of those findings of fact by the District Court (R., 21–24), which the Supreme Court affirmed, and which alone are brought to this court by appeal, that we shall, in the main, omit—at least, in the brief, and leave, if need be, for the oral argument—to take notice of any of the comments and contentions of the opposing brief, that are based upon evidence outside of said findings of fact, and shall proceed to consider the case on the assumption that the facts are as established by the District Court. (R., 21–24.)

Corrections as to some Alleged Facts.

From pages 6 to 10, inclusive, of the opposing brief, there is set down an enumeration of propositions of fact, as to which the brief says (p. 10):

"The foregoing facts are in most part admitted by the pleadings, and, also, established by abundant testimony."

The propositions of fact here declared to be admitted are some fourteen or more distinct propositions of fact.

At the bottom of page 6 of this brief begins the enumeration of those propositions of fact, alleged to be admitted in the case.

The making of the contract of September 19, Exhibit "A," and, also, the *making* of the contract of November 24, 1883, Exhibit "C," are not only admitted by the state of the pleadings, but are expressly found in the findings of fact; the making of "A" being found in finding 1. (R., 21.)

The making of "C" is found in finding 9. (R., 22, 23.)

The fact of the purchase and assignment to appellants of the Kitto lease, mentioned at the bottom of page 8 of the opposing brief, is also found as a fact in finding 5. (R., 22.)

The taking possession of the mines and the working of them, as stated on top of page 8 of opposing brief, is also found as a fact in finding 5 (R. 22), but not in the strength and extent stated in the brief.

The statement on page 8 of opposing brief, that during the time appellants occupied the mine they paid respondents, *as fast as obtained*, one-half of the gross proceeds of all ores, &c., amounting to $21,024, is not only not admitted, but the fact is found the other way, in finding 5 (R. 22, fol. 59), it being there found that they failed to pay over or account for one-half of the ores taken out

by them, or one-half of the bullion received; such finding, further, being that all in fact paid over was paid and received as *rents* or royalties under the lease.

Said finding 5 does find that $21,024 were paid as rent or royalty, but not that such $21,024 were one-half of *all* ores taken out or bullion received.

Is Contract "A" a Sale?

Without further enumeration of the alleged facts mentioned on pages 6 to 10, inclusive, it is sufficient to say of them that they are neither admitted by appellants, nor by the state of the pleadings, nor established by the proofs, except such as are included in, and found by, said findings of fact. (R., 21 to 24.)

For the reason already stated, namely, that it is beyond the jurisdiction of this court to find the facts other than those so found by the court below, or to find additional facts, we omit to enter into a discussion of what the evidence in the "statement for appeal" would establish; and, therefore, proceed at once to the next point in the opposing brief, which begins to be stated at bottom of page 10, where the contention is set up that the contract was a mutual one as to purchase and sale, and not unilateral; but one whereby the appellants acquired, as *vendees*, such property rights in the mine as grew out of a contract of actual sale, with mutual covenants as to payment and conveyance.

This is really the controlling proposition of fact and law on which the whole case was rested below, and is rested in said opposing brief. We, therefore, proceed to state the considerations which show that this position of appellants is wholly untenable.

These considerations may be enumerated as follows:

This fact is found in the said findings of fact to be directly the opposite of this contention of appellants.

These findings of fact, on this and some other points we now summarize.

In finding 1 (R. 21, fol. 56) it is found that plaintiffs, being in possession, made to defendants the "*lease*," Exhibit A, and thereby "*leased* and *let*" to the defendants the mining claim.

In finding 4 (R., 22, fol. 58) it is found that, by said *lease*, a *rent* or royalty of one-half of gross proceeds of property was reserved.

In finding 5 (R., 22, fol. 58) it is found that defendants, *as tenants* of plaintiffs, worked the premises, &c.

In finding 5 (R., 22, fols. 58 and 59) it is found that, by said "*lease*" (A), defendants stipulated for an *option to purchase* at any time before November 27, 1883, for $40,000, to be paid "either out of proceeds of mine or otherwise."

In finding 6 (R., 22, fols. 59 and 60) it is found that plaintiffs' covenant was to convey in the *event* of an election by defendants *within the time named in the lease*, "provided, that said sum of $40,000 should have been paid on or before the 27th day of November, 1883."

That, as expressed in finding 7 (R., 22, fol. 60), "*time* was, by the terms of said contract, and by the *understanding and agreement* of the respective parties thereto, at the time of its execution, of the *essence of the option to purchase.*"

In finding 8 (R., 22, fol. 60) it is found that, "by said *lease*, defendants covenanted to surrender possession the 27th of November, 1883, *unless before that time* the $40,000 should have been paid," &c.

That, as found in finding 9 (R., 22 and 23, fols. 60 and 61), at defendants' request, plaintiffs *extended* the *lease* for thirty days, and no further extension of the "*term*" of the option was made.

That, as stated in finding 10 (R., 23, fol. 61), the *option* to *purchase expired* with the 27th of December, 1883.

That, as stated in finding 11 (fol. 61), the defendants failed and refused to make the purchase, as provided in said option, and refused to pay the $40,000 on or before the 27th of December, 1883, and failed to pay any sum whatever, except $21,024, which in said finding 11 is found to have been *less* than the one-half of the gross proceeds of the mines.

That, as found in finding 12 (fols. 61 and 62), defendants refused, after expiration of said option, to surrender possession, and continued, until the commencement of this action, to work the Vichnu mine, and extract large quantities of rich and valuable gold-bearing ores, and threatened to continue so to do.

That, as found in finding 13 (fol. 62), during the thirty days' extension, between November 27 and December 27, 1883, defendants extracted large quantities of gold and silver ore, of great value, for part of which they have neglected, failed, and refused to account, either by payment of one-half of proceeds or otherwise.

That, as found in finding 15 (fol. 62), plaintiffs did *not acquiesce in, or consent to, defendants working the mine after December 27, 1883.*

That, as found in finding 16 (R., 22, fol. 63), defendant Resser did not, and has not, milled any gold-bearing rock or ore extracted from the leased mining premises during January, 1884, or delivered any bullion therefrom to defendants.

That, as found in finding 17 (fol. 63), the defendants were not *ready* or *able* to, and *did not offer to pay,* the $40,000, less the rent or royalty paid as aforesaid, prior to the 27th of December, 1883, or at any time prior to June, 1884; and their inability to do so did not arise from any act or default of plaintiffs.

That, as found in finding 18 (fol. 63), subsequently to the 24th of December, 1883, and prior to the commencement of this action, and on the 22d of January,

1884, *plaintiffs demanded the possession of the said premises from defendants*, who have thence and hitherto failed and refused to surrender possession.

That, as found in finding 19 (R., 24, fol. 63), defendants expended on the premises *less* than one-half the proceeds of the ore taken therefrom.

Here, then, in so far as these findings of fact are, in any proper legal sense, findings of *fact*, as distinguished from mere conclusions of law, we have it found by the record that this was a "*leasing*" for a prescribed "term," with an "option to purchase," the "term" to endure for one year, with the right to stop work when lessees should find or *deem* the work unprofitable. That, as expressed in finding 5 (fol. 58), they took possession as *tenants* of plaintiffs, under said agreement, Exhibit A, that the ores delivered and moneys paid were paid and received as *rent* or royalty under said lease (fol. 59). That, though a lease, there was coupled with it an "option to purchase," but the option to purchase was subject to a proviso that the $40,000 should be paid on or before the 27th of November, 1883, extended to December 27, 1883.

If it be so that this is a finding of fact, as distinguished from a mere conclusion of law, in such sense that this court cannot, in the light of the terms of Exhibits A and C, review it, then such finding by the court below is the end of this part of appellants' case.

In order to determine whether this is a "finding of *fact*" in the sense just indicated, it is proper to carefully observe what circumstances and conditions, *aliunde* the face of the said lease, courts and jurors may consider in determining the question whether this was a lease and a stipulation for rents or royalties, as distinguished from a purchase of the land.

If surrounding circumstances, outside of the contract, may, indeed, be looked to by the court and jury in determining such *intention*, then we submit that the finding

by the court below, that it was the "understanding" of the parties that the defendants below took possession of the premises as lessees and tenants of plaintiffs, and that the payments made in pursuance of the lease were made as and for rent or royalty, as distinguished from purchase-money, then such finding of said "understanding" is a finding of fact, and cannot be reviewed by this court in the light of said Exhibits A and C.

We, therefore, here pertinently inquire what considerations, outside of the face of Exhibits A and C, the courts and juries may look to, in determining the *design* or *understanding* of the parties, as to this being a lease, or, on the other hand, a purchase.

In approaching this question of law, it is proper, in the first place, to carefully premise, that extrinsic circumstances, and the light of surrounding facts, are resorted to in such cases as this only when the words of the instrument leave the matter in doubt as to the understanding or intention of the parties.

Partridge *v.* Insurance Co., 15 Wallace, 573.

In this court, in Grace *v.* Central American Ins. Co., 109 U. S., 283, this familiar branch of the law of evidence was brought under notice by an attempt to introduce, in order to explain or vary a written instrument, evidence as to usage or custom. In rejecting such evidence, the court, on this point, states as follows:

"An express written contract, embodying in *clear* and positive terms the *intention* of the parties, cannot be varied by evidence of usage or custom. In Barnard *v.* Kellogg, 10 Wall., 383, this court quotes with approval the language of Lord Lyndhurst in Blackett *v.* Royal Exchange Assurance Co., 2 Cromp & Jervis, 244, that usage may be admissible to explain what is doubtful; it is *never 'admissible to contradict what is plain.'* This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject-matter of their negotiations, have so expressed their intention as to take the contract

out of the operation of any rules established by mere usage or custom. Whatever apparent conflict exists in the adjudged cases as to the office of custom or usage in the interpretation of contracts, the established doctrine of this court is as we have stated. (Partridge *v.* Insurance Co., 15 Wall., 573; Robinson *v.* United States, 13 Wall., 363; The Delaware, 14 Wall., 579; National Bank *v.* Burkhardt, 100 U. S., 686.)"

The applicability of these authorities forbidding the resort to parol or extrinsic evidence in order to vary "what is plain," to the present case, is found in the fact that this lease is "plain" and unambiguous, touching the point that it is a lease with an option to purchase, as distinguished from a sale.

The following suggestions make it "plain" that it is a lease:

(1) That the Exhibit A (R., 4) begins by declaring expressly, in these words, that—

"This *indenture of lease, with the privilege of purchase*, made," &c.

It, therefore, in this clause, is something more than a mere giving of a *name* to an instrument. It is an explicit and minute attempt to *define* the character of the instrument as not a lease merely, but "a lease with the privilege of purchase."

(2) It adopts the words of a deed poll, as distinguished from an indenture, in the first, the most material, to wit, the *granting part* of the instrument, where it says:

"The said parties of the first part hereby *grant, demise*, and *lease* to the said parties of the second part," &c.

It then proceeds to describe the property granted, and, after such description (fol. 10), says, speaking of the grant, demise, and lease, that it is—

"From the 27th day of November, 1882, on the ex-

piration of a certain lease of the Vichnu and Idaho Mines, executed and delivered by the parties of the first part to Thomas Kitto," and others [naming them], "until the 27th day of November, 1883, upon the following terms and conditions."

Thus it makes a lease or demise for a designated period of time on the terms expressed in the instrument.

Then, at folio 11, in the provision relating to the surrender of possession, it uses the expression, "and, upon the expiration of the said *term* hereby granted," thus showing that it was a "term" that was granted, and not a perpetual title or a sale of the premises.

Then the provision for the surrender of the possession of the premises at the expiration of the "term" is, itself, totally repugnant to the idea of a sale by the direct and *present* effect of the instrument, as distinguished from a grant of a "term" or lease.

Then, again, the provision authorizing the lessors, at any and all times, to inspect the mines (R., bottom page 5, folio 12), is a provision appropriate to property leased, and inappropriate to property sold.

Then, again, the provision so often repeated in the lease, which makes, in terms, the payment of the $40,000 a condition precedent to the vesting of any right as purchaser, makes it utterly "plain" that this was to be a leasing, as distinguished from a purchasing, up to the time when the option to purchase should be decided upon and the payment of the $40,000 completed.

For example, in the provision at folio 11 (R., 5), where the words are—"*Provided*, That said sum of $40,000 shall have been paid on or before the said 27th day of November, 1883"—is, expressly, a making of the payment of the $40,000 to be a condition precedent to the vesting of any right in the title as purchaser, except said right of "option."

These provisions of the leases now pointed out bring

this lease within the rule that extrinsic facts cannot be resorted to to change the sense of instruments where no ambiguity exists and where the sense is "plain."

But suppose the sense of this instrument is not plain in fixing the intention of the parties to be that of leasing, with an option to purchase, as distinguished from an immediate and present sale at the date of the instrument, and that extrinsic facts may be resorted to, then what is the consequence of such conclusion being here reached?

Plainly the consequence is, that the finding, by the court, that the intention—the "understanding"—was to make a lease, and that all payments made were payments of *rent*, as distinguished from payments of purchase-money, were *findings of fact* within the sense of these words as used in the said statute of April 17, 1874.

In the case of Cavazos *v.* Trevino, 6 Wall., 784, on this point, of the right to take into consideration surrounding circumstances, in construing a grant of doubtful meaning, the court says:

"In construing this grant the attendant and surrounding circumstances, at the time it was made, are competent evidence for the purpose of placing the court in the same situation, and giving it the same advantages for construing the paper which were possessed by the actors themselves. The object and effect of such evidence are not to contradict or vary the terms of the instrument, but to enable the court to arrive at the proper conclusion as to its meaning and the understanding and intention of the parties. Viewing the subject in this light, we cannot say that the legal effect of the grant is to carry the eastern boundary of the grant to the line contended for by the plaintiff in error."

Here it will be observed that the jury were allowed to hear all attending circumstances connecting themselves with the making of the grant, in order to the determination of the fact as to where it was the intention of the parties to locate one of the lines of the grant. The jury

took these extrinsic facts into consideration, and found the intention to be to fix the boundaries of the grant at a certain place; and the court held *that* finding of the jury to be *conclusive*, there being no valid legal objections to the instructions to the jury on this point.

The court repeats this doctrine in the case of Goode *v.* Martin, 95 U. S., 95; the court here quoting the case of Cavazos *v.* Trevino, *supra;* also, Shaw *v.* Wilson, 9 Clark & Finley, 352; Golden *v.* Greyson, 4 Nev. and M., 602; Addison on Contracts (6th ed.), 918; 2 Taylor's Evidence (6th ed.), 1035.

The same thing is found in Zantzinger *v.* Ketch, 4 Dall., 132.

The same thing is repeated by the court in United States *v.* Gibbs, 109 U. S., 200–203.

The result, then, thus far, as to the present point, is this: That *if* we are mistaken in saying that the instrument, by its face, plainly and unequivocally makes a lease, as distinguished from a sale, then is cannot be reasonably pretended that the instrument is *so plainly a sale*, as distinguished from a lease, as to make the admission of parol evidence improper. Parol evidence was admitted generally in the trial below, showing the relations of the parties to this business; the nature of the property as mining property, capable of being exhausted, &c. And, in the light of the written instruments A and C, and the further light of the surrounding facts, the court has expressly found this to have been a lease and not a sale, and that all payments made, amounting to $21,024, were payments of *rent* or royalty, and not of purchase-money.

This, therefore, is a finding of fact on evidence both in the instrument and outside of the instrument, and is not a mere conclusion of law.

It may be, and probably is, a *mixed question of law and fact;* and, if such, then the law is equally settled in re-

gard to the conclusiveness of this finding below of such mixed question, for the purposes of this trial.

Upon this point this court has passed in repeated instances.

In Martinton *v.* Fairbanks, 112 U. S., 670, the case was for the recovery, from a municipal corporation, of the amount of certain coupons issued in payment of a subscription of stock in a railroad corporation. The case was tried before the judge, without the intervention of a jury. There was a general finding of facts and a judgment for the plaintiff below, and a general bill of exceptions by the defendant, which incorporated all the evidence. The defendant sued out a writ of error; and the court, after hearing the evidence, found the issues for the plaintiff, and assessed his damage at $11,209. On these findings the court entered judgment for plaintiff; and the bill of exceptions was taken embodying all the evidence; and the court was urged to find that, on that evidence, so at large set forth in the bill of exceptions, no warrant could be found for rendering the said judgment.

And the court there held, in refusing to re-examine the facts found by the court below, that—

> "The general verdict of a jury *concludes mixed questions of law and fact*, except so far as they may be saved by some exception which the party has taken to the rulings of the court upon a question of law." Citing—
>
> Norris *v.* Jackson, 9 Wall., 125.

This case of Norris *v.* Jackson, which is found in 9 Wall., 125, and the case of Martinton *v.* Fairbanks, 112 U. S., 670, and the great multitude of other similar cases, are cases where the finding by the court was had under the fourth section of the act of March 3, 1865 (13 Stats., 501), now section 649 of the Revised Statutes. It provided for finding by the court where the parties waived a jury upon the facts, and that such findings might be either general

or special, and have the same effect as the verdict of a jury.

In the respect here involved this statute is not different from the statute of April 7, 1874, and this court holds, as we have seen (112 U. S. R., 674), that the court's findings of *mixed questions of law and fact* are equally conclusive, and incapable of review here.

If, therefore, the findings by the court in the present case, that this was a lease, and that the payments made were *rents* and not purchase-money, and that such was the "understanding" of the parties, are to be deemed findings of "mixed questions of law and fact," or, on the other hand, are to be deemed findings of fact, pure and simple, as to the state of the intention of the parties to the contract, in either case the finding by the court is equally and absolutely conclusive here, and settles the question of fact that this was a lease, and that the payment of the $21,024, was a payment of *rents* or royalties, and not a payment of purchase-money,

What we have now gone over establishes, as we confidently submit, that these instruments A and C are leases, and payments thereunder are payments of *rent*, and not payments on purchase-money.

The Face of Exhibit "A" Makes it a Lease.

But we now take another step in this discussion, and, for the sake of the argument, will assume that the finding of the court below on this point is not conclusive, and that this court is at liberty to look at these instruments to determine whether they make out a case of purchase and of payment of $21,024, on the $40,000 of purchase-money, or do not.

Even in that event, the same conclusion will be inevitably reached as was reached by the court below.

Please observe the terms of this instrument bearing

upon the point whether, under the indisputable facts in the case, these parties, plaintiffs and defendants, ever came into the relation to each other of vendor and purchaser, as distinguished from that of lessor and lessee.

Now, please notice the provisions of this instrument A bearing upon the question of sale or no sale.

We have already gone over, in detail, the provisions of the instrument A, going to show that it is a lease, and these, of course, are here to be kept in mind in determining whether this instrument made a sale. But we need not repeat the reference to said provisions showing a lease.

We now point to those going to show that no transfer of title in the mining property could have occurred under the terms of said instrument Exhibit A, and under the undisputed and indisputable facts found by the court below.

Observe the following provisions of the instrument Exhibit A:

(*a*) It declares, as we have already pointed out at the outset, not that it was a purchase, but a "lease with the privilege of purchase."

(*b*) There are no words importing a "bargain and sale," or a selling, or any language that amounts to that, and no reference to a purchase or sale, except in connection with the said "option."

(*c*) On the part of the lessees or grantees there is not a stipulation anywhere *binding them to purchase*, or to pay a dollar of purchase-money, or to pay for any length of time the stipulated one-half of the ore or money realized. On the contrary, it is expressly covenanted that the second party should hold the property only so long "as they shall *deem* fit."

Again, the covenant to work the mine (R., 5, fol. 11) is limited, expressly, to continue only "so long as they shall find it profitable."

Again, on the same point, the stipulation is (R., 6, fol. 12) "that the parties of the second part shall have the right at any time to stop work on the said mines when they shall find or *deem* the same unprofitable."

Thus, not only is there absolute *absence* of all obligation to purchase, on the part of the second parties, but there is quadrupled the express covenant that there *should be no obligation on the second parties to purchase on any terms, or at any price, or at any time, and that their right to quit was absolute and unlimited as to time and conditions.*

Although it does not bear upon the point we now consider, yet we may as well notice here as anywhere the contention which the opposing brief bases upon the alleged fact that the payment of one-half of the ore extracted would be double what would be a just rent for the mine, and that this fact tends to show that said instrument "A" was meant to be a sale of the mines and not a lease. That this tendency to show a sale arises out of the fact that, if said half was paid as purchase-money, then said excess above what the rents would be worth becomes immaterial to the second party to said Exhibit "A."

The payment of so much as one-half, or of anything, it was expressly covenanted, should not be required to continue, unless the payment of that much was profitable. Therefore, this contention, which says that the payment of one-half was exorbitant and excessive, falls to the ground—stricken down by the express terms of the instrument. The parties stipulated that it should only continue as long as the parties pleased to continue it, and only continue when *it was profitable to pay that much and to continue working the mines.*

Again, as bearing upon the question whether this is a purchase, or, on the other hand, a lease, notice those features of the contract which make the payment of $40,000 within a prescribed time to be a condition prece-

dent to the vesting of any interest in the second party under said clause securing said option to purchase. They are express, and, also, are three times over repeated.

First notice the provision (fols. 10 and 11, R., 5) where, after providing that the second parties, as long *as they should deem fit*, were to hold the property, and to mine and extract ore therefrom, and pay to the first parties one-half the gross proceeds, in the manner therein specified, and that when the sum of $40,000 should have been paid, either out of proceeds or otherwise, by the second party, then it was, *and only then*, that the first party did (here quoting the words of the instrument) "hereby covenant and agree for themselves, their executors and administrators, and assigns, to and with the said parties of the second part, their heirs and assigns, to convey to them, by good and sufficient deed, all of the above-described property, free and clear of all encumbrances, upon such payment."

Here the obligation to convey is twice over expressly limited to the event of the full payment of the $40,000 according to the provisions herein specified, that is, within the time named in Contract A, to wit, the 27th of November, 1883, and, in Contract C, the 27th of December, 1883.

But the instrument further proceeds to repeat a third time that which makes the payment of the $40,000, within said time, a condition precedent to the vesting of any property rights as purchaser.

It says (R., 5, folio 11):

"*Provided*, Said sum of $40,000 shall have been paid on or before the 27th day of November, 1883."

No words could be adopted, by possibility, more conclusively making the payment of the $40,000, within the time stipulated, a condition precedent to the vesting of

any rights under this contract in the second party as purchaser.

Then (folio 11), in the provision requiring them to work the mine in a proper manner so long as they should find it profitable, or might deem fit, and, further, requiring them to surrender the possession at the expiration of the said "term hereby granted."

It is here again repeated that such surrender should occur "*unless, on or before the said 27th day of November, 1883, the said sum of $40,000 shall have been paid.*"

Then (R., 6, folio 14), in the provision where the first party covenants to convey, this obligation to convey is again coupled with said condition precedent, to wit, the full payment of $40,000, within said prescribed time, in these words:

"And the said parties of the first part, for themselves, their executors and administrators, and assigns, hereby covenant and agree, to and with the said parties of the second part, their heirs and assigns, to convey, by good and sufficient deed, all of the above-described property, free and clear of all encumbrances, to them, the said parties of the second part, or their assigns, at any time, *upon the payment to them, the said parties of the first part, of the sum of forty thousand dollars ($40,000), either out of the proceeds of the mines, or otherwise, on or before the 27th of November, 1883, in the manner herein specified.*"

The covenant C in no degree or respect alters this, except to extend the time of the option for one month.

Reducing, then, these provisions now recited to their real substance, they all amount to what is provided in the stipulation, at fol. 11, where, in covenanting for the deed, it is stipulated in these words:

"Provided, that said sum of $40,000 shall have been paid on or before the 27th day of November, 1883."

This provision is, as we have seen, some four or five times over repeated, in each place, making this payment

of $40,000, within the stipulated time, to be a condition precedent to any obligation to convey, or to any sale.

Now, in the light of these provisions, notice some of the cases bearing upon the question whether, under such an instrument, any title passes to the second party as purchaser in the absence of strict compliance with the terms of the option.

The case in this court of Richardson *v.* Hardwick, 106 U. S., 252, is not, in any of the aspects of it which are here material, different from the case at bar.

It will be observed that, in that case, the contract (which is on pages 252 and 253) was one which, in substance, provided that Richardson (the alleged purchaser of the lands) might become equally interested in the lands with Hardwick, by paying to the owner thereof (Hardwick) one-half of the purchase price paid by Hardwick for the lands, together with Hardwick's other expenditures and interest. The purchase price was to be reckoned at $10 an acre, and the "terms of the above agreement are *limited to two years from this date.* Said Richardson is to pay one-half of his share in *one year*, and the balance in *two years.*"

The contract also provided that Richardson was to pay $1.50 a thousand for timber cut by him; he was to cut not less than twelve thousand five hundred feet on each acre on which he might cut any, or, in the event of his not doing so, he was to pay for twelve thousand feet, the same as though the amount had been cut by him.

There the court says:

"It is not disputed that, before the date of this contract, Hardwick purchased the lands described therein, paid for them in full out of his own means, and received a deed therefor in his own name. Prior to October 1, 1870, the date at which the two years mentioned in the contract expired, Richardson had, on the terms mentioned in the contract, cut timber on the lands, and paid to Hardwick

for 'stumpage' $4,050, and, unless this is to be considered a payment on the contract, he, up to the date mentioned, made no payment whatever thereon. On or just before October 1, 1870, by a verbal contract between the parties, the time for the payment by Richardson of the half of the price of the lands was extended to October 1, 1871. Neither up to that time nor subsequently did he make or tender payment on the land. In the meantime Hardwick was selling timber off them, and in the year 1872, sold all the lands except one hundred and sixty acres. The contention of Richardson now is, that, after crediting upon the contract one-half the amount received by Hardwick for timber and lands sold, the half of the purchase-money and other expenses, which he was to pay in case he became equally interested in the lands, has been satisfied, and that he is entitled to an equal share of the proceeds of the timber and lands, and to a conveyance of an undivided half of the lands remaining unsold."

As to this contention the court, in its opinion, say:

"But it was not until May or June, 1874, that he ever intimated to Hardwick that he claimed an interest in the lands, and his claim was then peremptorily denied by Hardwick, and it was not until he filed the bill in this case, December 10, 1875, that he ever made any definite demand on Hardwick for an account of the proceeds of the sale of timber and lands, or a conveyance of the undivided half of the lands remaining unsold."

The Circuit Court dismissed the bill, and Richardson appealed to this court.

The court in its opinion (p. 254), after remarking that the parties' rights must be governed by their contract as it exists in writing, that previous negotiations were merged, that they could give no weight to the contention of Richardson that it was one of the unexpressed terms of the contract that one-half of the proceeds of the timber sold from the lands should be indorsed upon the contract as payments made by him thereon—after adding this,

the court proceeds to say, in excluding all such outside testimony, and, speaking of the contract, that—

"Its plain meaning is that Richardson was to make payment directly to Hardwick, in money, of one-half the amount paid by the latter on the lands. It is, therefore, not competent to show, by parol, that payment was to be made in some *other* way than that specified in the written instrument. (Sprigg *v.* Bank of Mount Pleasant, 14 Pet., 201; Specht *v.* Howard, 16 Wall., 564; Forsythe *v.* Kimball, 91 U. S., 291; Brown *v.* Spofford, 95 *id.*, 474.)"

The court then proceeds to determine whether Richardson, having made default in payment within the time prescribed by his contract, acquired any interest in the land, such as could be enforced in equity; and on this point the court say:

"The written contract gives him the *privilege*, or, as counsel call it, an '*option*,' to become equally interested in the lands by paying one-half the purchase-money, &c., *within two years* after its date. THE CONTRACT, OF ITSELF, DID NOT VEST HIM WITH ANY INTEREST OR ESTATE IN THE LANDS; it merely pointed out the mode in which he *might acquire* an interest, namely, by paying a certain sum of money within a certain time. He did not pay the money *within the time limited by the contract*, and has never paid it, or any part of it; and eighteen months before the commencement of this suit Hardwick gave him notice that his option to purchase had been lost, and told him that he had no interest in the lands.

"It is *clear* from the terms of the contract that Richardson was not bound by it. *He* did not agree to purchase any share in the lands or to pay Hardwick any money. *The contract gave Hardwick no cause of action against Richardson.* The latter was not bound to become interested in the lands, or to pay any money thereon, unless he chose to do so.

"*In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound.* (Jones *v.* Robinson, 17 L. J. Exch., 36; Mills *v.* Blackall, 11 Q. B., 358; Mor-

ton *v.* Burn, 7 Ad. & E., 19; Kennaway *v.* Treleavan, 5 Mee. & W., 498.)

"In this case Richardson, having failed to pay the money, or any part of it, *within the time limited, the privilege accorded him by the contract was at an end, and all the rights under it ceased.*

"The decree of the Circuit Court dismissing the bill was, therefore, right, and must be affirmed."

We have thus fully alluded to this case because, in all respects here material, it is "on all fours" with the case at bar, and rules it.

It is like the case at bar in the respect that it was a case for specific performance. It is like it in the very essential fact commented on by this court at page 255, 106 U. S., that there was no obligation on the part of Richardson to pay, as there is no obligation on the part of appellants here to purchase. And it is like it in the respect that it merely stipulated for an "option," and gave no interest in the *land itself*—was like it in the respect that an extension of time within which the option might be exercised was, by a new agreement, entered into; and is like it in every other respect except that the covenants in Contract A, in the present case, are altogether more conclusive and unmistakable in making the payment of the $40,000, within the time, a condition precedent to the vesting of any right in the land.

If it be said that this case of Richardson *v.* Hardwick is distinguishable from the one at bar owing to the acquiescence of the appellees in the default, then the reply to that is that there was no such acquiescence. On the contrary, it is expressly found by the court below, in finding 15 (fol. 62, R., 23), that the plaintiffs did not acquiesce in, or consent to, defendants working or mining upon the said premises after December 27; and that on the 22d of January, 1884 (finding 18, R., 23, fol. 63), plaintiffs below demanded possession of the premises, and that such possession was refused.

And, then, as to the alleged waiver or acquiescence that is claimed to be found in the payment on the 29th of December, 1883, of $948.96, as proceeds of ore taken out prior to the 29th of December, 1883, the reply to that is, that the facts found by the court below negative the idea that this was a payment of "purchase-money," as distinguished from a payment of rent; and such findings *establish* that it was a payment of rent or royalty for ores extracted *before* the 31st of December, 1883. For example, at the end of finding 5 (R., 22, fol. 59), the court finds that "ALL the moneys received by the plaintiffs were *received as rent*, or royalty, under and according to the terms of the *lease*, and were proceeds of ores mined and extracted from the said premises *prior* to December 28, 1883.

These words, "*all* of said moneys so received by plaintiffs," &c. (fol. 59), embrace said $948.96, and, therefore, find that they were paid as *rents*, or upon the one-half of ores required to be paid, by said Contract A; and this for time *anterior* to the expiration of said term and option.

Therefore, the case at bar is not distinguishable in any material respect from the case of Richardson *v.* Hardwick, and, as remarked, the case at bar is, we submit, ruled by this case of Richardson *v.* Hardwick.

Again: Observe the repeated stipulation contained in Exhibit A that, on failure to pay the $40,000 within the time named, the premises were to be surrendered.

In this respect the case at bar is not unlike Stinpson *v.* Duzman, 20 Howard, 461.

There the suit was for the recovery of $481.16 as rent for a parcel of land in St. Paul, under a written contract of February, 1854, between Duzman and Stinpson, Duzman being plaintiff in the case. By this contract it was stipulated, on the part of Duzman, to sell and convey the land to Stinpson for $8,000, *to be paid annually in three installments*, with interest; the first installment of $2,000

and interest to be paid September 1, 1854. The vendee was required to keep the buildings insured, &c., and he agreed to pay the taxes. The contract concluded with an express condition "that in case of failure by the vendee to perform either of the covenants on his part, the vendor was at liberty to declare the contract void, and thereupon to recover, by distress or otherwise, all the interest which should have accrued on the contract, up to the day of declaring void, as rent, and to take immediate possession."

It was further agreed that if the vendee paid the entire purchase-money, or secured it, he should have a deed at any time after payment of the first installment. Contemporaneously with the execution of this contract, the vendee, Stinpson, gave his note for the first installment. This installment was not paid according to the contract, or the note; no insurance was effected on the property within the terms of the agreement before September 5, 1854, nor the taxes paid before that date; and, on September 14, 1854, plaintiff notified defendant that the contract of a sale was annulled, and he should claim as rents the amount of interest that had accrued, &c. The object of the suit was to recover this rent.

The claim of defendant was that said note was accepted as payment; that he had attempted to pay the taxes, but was forestalled by the payment thereof, made by the plaintiff, &c.

The court below decided that the answer was not sufficient, and judgment was entered for plaintiff.

In this case this court held that it showed a contract where the parties had, by the terms of the contract, *made time to be of the essence of the contract.* And the court, in regard to the rule applicable to a case where such was the contract, proceeds to say (page 466):

"But if the parties have declared in their contract that time is a material consideration, and have agreed that

their rights shall depend upon a scrupulous fidelity to their engagements, it does not belong to that court to make another law for the parties. Where it plainly appears that the sale is conditional, and its completion is dependent upon the fulfillment of any of the terms with punctuality by either party, a court of equity, in general, will not interpose to relieve the party in default, on the principle that time is not of the essence of the contract.

"In the case before us, the contract recites that the vendor, in consideration of one dollar, part of the purchase-money thereafter mentioned, and then actually paid, and upon the *express condition* that the defendant do well and faithfully perform the covenants and agreements thereafter mentioned, agreed to execute and deliver a deed of conveyance in fee-simple, &c.

"To the terms of sale there is the condition, '*Provided always* (and these presents are upon this express condition), That in case of failure in the performance of either of the covenants or agreements on the part of the vendee to be performed, the vendor shall have the right to declare this contract void.' The contract concludes with a minute description of the relations and consequences that were to ensue from the exercise, by the vendor, of the right he had thus reserved."

The court, therefore, held, as to this contract, that the parties had made time of its essence, and that punctual payment, to the day, was essential to give the parties any right under the contract, and they, therefore, affirmed the judgment below in favor of the plaintiff.

Notice, now, how exactly the present contract agrees, in the repect here material, with the one passed upon in Stinpson *v.* Duzman, *supra.*

As already seen, Contract "A" not only stipulates that the deed was to be made *only* in the event expressed in these words, "*provided* that the said sum of $40,000 shall have been paid on or before the 27th of November, 1883," but it also provides that possession should be surrendered promptly on the 27th of November, 1883, "*unless on or before said date the said sum of $40,000 should*

have been paid." And the contract again repeats, out of abundant industry, as follows:

"In the event of the said parties of the second part, or their assigns, failing to comply with *either or any* of the foregoing covenants, or *any* covenant, promise, or thing herein contained on their part to be done, kept, or performed, then *it shall be lawful for the said parties of the first part to re-enter, possess, and enjoy the above-described property and premises and every part thereof; and the said parties of the second part hereby agree, in the event of such non-performance on their part, to surrender possession of the said premises upon demand by the said parties of the first part, claiming their right to re-enter.*"

This provision is, in substance, the same that is commented upon by the court in Stinpson *v.* Duzman, 20 Howard., 466, and which stipulated in these words:

"Provided, always, and these presents are upon this express condition, that in case of failure in the performance of either of the covenants or agreements on the part of the vendee to be performed, the vendor shall have the right to declare this contract void."

This stipulation this court held, in the case of Stinpson *v.* Duzman, established an intent to make time of the essence of the contract.

Surely the stronger and the re-duplicated provisions in the contract at bar establish the same intent to make time of the essence of the contract.

In the late case of Harkness *v.* Russell, 118 U. S., 663, in a case of the sale of personal property, this court held, what the syllabus accurately states, in the following words:

"In the absence of fraud, an agreement for a *conditional sale* of personal property, accompanied by a delivery, is good and valid, as well against third persons as against the parties to the transaction.

"A bailee of personal property, who receives it under an agreement that he *may purchase it on the performance*

of conditions on his part, cannot convey title to it, or subject it to execution for his own debts, until performance of the conditions on which the agreement to sell is made."

The opinion, by Justice Bradley, in this case, is one of the most exhaustive and valuable which is to be found in the history of this court; and the doctrine which it lays down, as above quoted from the syllabus, is one that is applicable, with even more force, to the case of sales of real estate.

This is so because that, the case of a conditional sale of personal property, accompanied by delivery of possession to the conditional vendee, gives much greater opportunity for fraud by sales to third persons than can be true of real estate.

The doctrines of that case, applied to the case at bar, would, we submit, exclude the possibility of holding that contract Exhibit A makes a case of transfer of any possible interest, to appellants, in the mining property involved.

This is obviously so under the doctrines of Richardson *v.* Hardwick (106 U. S., 252), because that, when, as to a case involving the alleged sale of real estate, this court holds what is thus expressed in the head-note to the case of Richardson *v.* Hardwick—

"A, the owner of lands, covenanted that, by making certain payments within a period named, B might become equally interested in them. B did not agree to purchase, and he never made any payment. Held, that an estate in the lands was not by the contract vested in B, and that his failure to make payment within the time limited therefor worked a forfeiture of his privilege under the contract"—

it therein holds the *same* doctrine as is held in the case of Harkness *v.* Russell (118 U. S., 663), which doctrine

in the case of Harkness *v.* Russell is, as already stated, that—

"A bailee of personal property, who receives it under an agreement that he may purchase it on the performance of conditions on his part, cannot convey title to it, or subject it to execution for his debts, until performance of the conditions on which the agreement to sell is made."

Stated in other words, these two cases place upon precisely the same grounds contracts touching real and those touching personal property which, in their nature, are agreements for an option to purchase or are purchases on an express condition precedent, and are not, therefore, a purchase until the option is acted upon, and, by performance, complied with. This class of agreements, therefore, to wit, contracts giving an option to buy or to sell, stand upon their own legal principles, and not upon the principles applicable to actual contracts *of* purchase or sale. Such contracts securing options, as we see by the cases now presented, must be complied with to the letter before any title is transferred, or in any degree affected.

Strictly speaking, therefore, such contracts for options are not contracts, so far as relates to their effect upon actual title, to which the rules of law, relating to time being of the essence of contracts, or not, are usually applied. Contracts merely securing option do not purport to convey title at all, at the time they are made, or to affect it. They only put the parties in a position where, by performance of named conditions precedent, such titles may *become* affected. The performance of such conditions precedent is, therefore, *indispensable* before the agreement securing an option can reach to, or affect, the title. And this is equally true in real and personal property, as we have seen by the three unanimous holdings by the court in Richardson *v.* Hardwick, Harkness *v.* Russell, and Stinpson *v.* Duzman, *supra.*

In this view of the case it is hardly needful to enter upon an examination of the decisions as to when time is or is not of the essence of contracts relating to sales of land, because this, properly speaking, is not a contract attempting to make a sale of land, as distinguished from a purely unilateral stipulation, securing, for an exactly defined and limited time, and upon express conditions precedent, a mere option to purchase.

When Time of Essence.

But, in the way of abundant caution, we deem it proper to bring together a view of some of the decisions in regard to when time is of the essence of contracts relating to sales of land, or relating to giving options for the purchase or the sale of lands.

In the light of these decisions, to which we now turn, it will be seen that no doubt is left that, under the circumstances of the contract involved in the case at bar, the time of payment of the $40,000 was made to be of the essence of the contract, in such sense as that there was no sale unless the $40,000 was paid within the time stipulated.

It is proper to say at the outset that this court has often held that time may be of the essence of a contract of sale of property, and that (here using the words of this court) "it may be made so by express stipulation of the parties, or may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser."

This is the language of syllabus in Taylor *v.* Longworth, 14 Peters, 174.

This court again, in Holgate *v.* Heaton, 116 U. S., 40, in alluding to this doctrine in Taylor *v.* Longworth, *supra*, quotes from the opinion of Story, J., what we have just

quoted. Justice Miller says in regard to it, speaking of Mrs. Eaton's claim for specific performance in that case:

"Her only ground of success in the present suit, therefore, is in the principles of equity jurisprudence in enforcing a specific performance of the agreement to buy the land and to pay the purchase-money, and the allowance which the Court of Chancery sometimes makes for delay when time is not of the essence of the contract. In the case of Taylor *v.* Longworth, 14 Pet., 172–174, Mr. Justice Story uses language which has since become a *legal maxim in this class of cases.* In the first place he says: 'There is no doubt that time may be made of the essence of a contract for the sale of property. It may be made so by express stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not thus expressly or impliedly of the essence of the contract, if the party seeking specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has in the intermediate period been a *material change* of circumstances affecting the rights, interest, or obligation of the parties, in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust.'"

The most enlightened courts of this country have constantly held that the doctrine of courts of equity that time is *not* of the essence of a contract, *should not, in this country, be applied, as a general rule, to the sale of land.*

The reason given for this in Goldsmith *v.* Guild, 92 Mass. (10 Allen), 241, is thus expressed in the opinion of the court:

"The strict rule of law in respect to time as an essential part of a contract does not prevail in equity, and the doctrine that 'time is not of the essence of the contract' has been applied to many cases. But this doctrine applies to sales of property only in cases where time is *immaterial to the value;* and is urged *only* by way of pretense

and evasion; and does not apply to a sale of property the value of which is *subject to daily fluctuation.* (Doloret *v.* Rothschild, 1 Simons and Stuart, 590.) In this country time is regarded as more important in respect to the sale of land than in England, because the value of land is more fluctuating here than there. (Hepburn *v.* Auld, 5 Cranch, 262; Richmond *v.* Gray, 3 Allen, 25.)

If this be true in regard to lands in general, and agricultural in their character, how much more must it be true when applied to mines, which, according to the experience of all countries, and of which the courts will take notice, are rapidly exhausted by being worked.

On this same point, of the inapplicability of the rule that equity does not make time of the essence of contracts, as a general rule, the court, in Barnard *v.* Lee, 97 Mass., 94, uses these words:

"In this age and country, as suggested by Mr. Justice Livingstone in his dissenting opinion in Hepburn *v.* Auld, 5 Cranch, 279, by Mr. Justice Chapman in Richmond *v.* Grey, 3 Allen, 31, and in Goldsmith *v.* Guild, 10 Allen, 23, and by many judges in other States, the more frequent *fluctuations in the value of land and in business circumstances of men than in England* when the doctrine was established are more important to be considered in each case, and, especially, when the vendee sues to compel the specific performance of a contract for the purchase of land to which he is unable to make a good title at the time of bringing his suit."

There will, of course, be no successful contention made against the proposition which we have just quoted from 10 Allen, 23 and 97 Mass., 94, that the rule regarding the materiality in contracts relating to the purchase of real estate is different in this country from that which prevails in England; and that time is, as a general rule, more essential in such contracts here than there.

Notice, now, in the light of this rule, as found in Goldsmith *v.* Guild and Barnard *v.* Lee, *supra,* or even of the

rule which prevails in England regarding the effect of the liability to fluctuations in value upon the matter of making time to be of essence in contracts touching land, that, in the case at bar, it was, at the making of this contract, known and self-evident to the contracting parties that fluctuation in value was as inevitable as the efflux of time; but that fluctuation was to be inevitably downwards unless in case of new discoveries.

This was so because Contract A required the constant working of the mines; and the parties, of course, knew that every ton of ore extracted from the mines worked a positive depreciation of the value of the mining property. The parties contemplated that depreciation of value, and expressly provided for it by requiring that the depreciation should not go on, in the absence of the full payment of the $40,000, an hour beyond an exactly defined and stipulated time; and, again, provided for it by granting, for a valuable consideration, a new thirty days' extension, specifying in such extension that the extension should include all of the last day named in it.

In this condition of things, is it conceivable that a sane man should not regard and make to be essential the time when this property, so being depleted, should, in absence of full payment therefor, cease to be depleted.

We have seen by the passages in the contract we have pointed out bearing upon this point that he *has* made time of the essence of his contract by the express terms thereof.

There is one other feature of the contract showing time to be of essence, which we have not specifically alluded to. It is the fact that when the time fixed by Contract A was expiring, and three days before its expiration, the parties agreed upon an extension *to a precise day*, to wit, thirty days from the time first fixed, or until *and including* the 27th of December, 1883.

How solicitous the parties were about time as of essence, is indicated by this wording of the contract. It not only

fixes a day within which the option should terminate if the payment were not then fully made, but it descends to the particularity of saying that it should *include this 27th day of December*. And so of essence did both parties consider time that for these thirty days the proposed purchasers agreed to pay a consideration in reducing the Idaho ledge, to be conveyed, from 1400 feet to 1376½ feet.

Special Notice of Exhibit C.

In passing, and though out of place, it yet is proper here to allude to a feature of this Contract C (R., 7), which is much dwelt upon in the opposing brief, and to which we have alluded, namely, the fact that it calls the $40,000 "purchase-money." The opposing brief seeks to make out that the use of these words, "the balance of the purchase-money," shows that the defendants below had then and thereby (if not before) made themselves purchasers, as distinguished from lessees.

There is obviously no substance in this contention, for reasons plain and express on the face of these instruments. One is that this instrument "C" shows that it in no way, or degree, *changed* the relations of the parties to the subject-matter, to wit, the mining property, otherwise than to *extend* the time for the option. If one party was a lessee and the other a lessor *before* the thirty days began, then so each was afterwards. If the payment of said one-half *before* the 27th of November was a payment of "rent," then so it was afterwards and during the thirty days; this because the instrument "C" stipulates in express words that what it accomplishes is a mere *extension* of the time, of the duration of the above instrument, "A" to *and including* the 27th of December, 1883. Of course, if the instrument was extended, it was extended *with all its terms and conditions continued*, except only the thirty days' extension.

Then in the stipulation signed by the first party (the appellees here), their language is "that, in consideration of the above covenants, we hereby *extend the time on the within instrument until and including the 27th of December, 1883.*"

This, then, is an extension of all the parts, terms, and conditions of the said instrument precisely as they existed before the 27th of November.

As to the use of the words "purchase-money," that use was perfectly proper, because it *was* purchase-money they were stipulating about in this sense, to wit, that the parties were given thirty more days in which the second party had it in their power to make it to be "purchase-money" instead of rents. The extension was on purpose to enable them to so make it to be and *become* "purchase-money."

This is all there is of and about this point, made by the opposing brief, on the effect of Contract C turning this transaction into a positive purchase or sale.

Further Cases on Time of Essence.

But we return to the point at which we digressed, and now proceed to present the facts and holdings in a few cases bearing upon this matter of time being of the essence of such contracts. This we do simply as a means of illustrating and enforcing the position we take in asserting that not only the express terms of this contract make the time of payment to be of the essence of it, but that the *circumstances* of the case conclusively do the same thing.

Take now, for example, from 3d Pomeroy's Equity Jurisprudence, sec. 1408, pp. 454, 455, upon that feature of contract Exhibit C, to which we have alluded, which descends to the *exactness* of specifying that the extension of the time for payment of the $40,000 was to, *and including*, the 27th day of December, 1883.

On that point the author uses these words:

"Time may be essential. It is so *whenever* the intention of the parties is clear that the performance of its terms shall be accomplished *exactly* at the stipulated day."

Here, if language can make anything clear, this language, saying that the extension should be to, and should *include*, only the 27th day of December, does make that fact clear.

The author proceeds:

"The intention must then govern. A delay cannot be excused. A performance at the time is essential, and *any* default will defeat the right to a specific enforcement."

To this the author cites:

Hipwell *v.* Knight, 1 Younge & Collyer, Eq. Exch., 401.
King *v.* Ruckmann, 20 New Jersey Eq., 316.
Prince *v.* Griffin, 27 Iowa, 514.
Knott *v.* Stevens, 5 Oregon, 235.
Grey *v.* Tubbs, 43 California, 359; and other cases.

In the case, above cited, of Prince *v.* Griffin (27 Iowa, 514), the facts were, in substance, that McDaniel, in September, 1852, was the owner of a certain lot, and then entered into an agreement with Jackson to convey it to his wife, Mrs. M. H. Jackson, on the payment of five promissory notes given therefor—one for $200, due presently; one for $500, due November 15, 1858; one for $200, due September 8, 1859; one for $200, due September 8, 1860, and another for $400, due September 8, 1861; the purchaser to pay taxes; if notes not paid as they matured, or if taxes not discharged as agreed, the obligation to be void, *at the option of McDaniel;* and any and all payments which may have been made, and all rights

which may accrue to said Jackson by virtue of the contract, to be forfeited to McDaniel, as well as improvements of every description, after sixty days' notice of such failure being given; it being understood and agreed that Jackson was not to claim or have the benefit, or right, as occupying claimant, as provided in section 80 of the code of 1880; but, upon failure to pay as aforesaid, they are to forfeit all right, title, and interest in the lot, and all improvements made thereon, to the said McDaniel absolutely and forever. Further, that, on failure to pay, Jackson shall be held, and may be *treated, as lessee holding over* after the termination of the lease.

Default being made in the payments, the court held that time was, by the terms of the contract, and the circumstances of the case, made to be of the essence of the contract, and the failure to pay at the date, &c., ended all the rights of the parties purchasing.

This author, Pomeroy, in same note 1, to the same section, 1408, proceeds in these words:

"Time may become essential from the subject-matter or object of the contract, as, for example, *where the value of the subject-matter necessarily fluctuates and changes with mere lapse of time.*"

To this proposition the cases cited are very numerous, and include the cases in—

1 Yonge & Collyer, 416.
1 Simons & Stuart, 590 (which was a case of stocks).
1 McLean, 50.
8 Peters, 420.
6 Wheaton, 528.
5 Cranch, 262.
21 Wallace, 302.
29 Maine, 351.
10 Allen, 239.
70 Illinois, 331.

This case last named (in 70 Illinois, 331) is Hoyt *v.* Tewksbury. Some of its features are extremely appropriate in the present case. One of these features is expressed in the sixth paragraph of the syllabus in these words:

"Where the purchaser of land has an *option* to avoid the contract for objections to the title, any delay in deciding whether he will accept the same will defeat his right to specific performance."

In the case at bar he had much more than an option to avoid the contract on the ground of objections to the title. He had reserved the absolute and unlimited right to avoid taking the land and working it. This on his own *mere* will and pleasure.

In such a case surely any delay of him in performing his part by payment will be fatal to his rights.

The eighth paragraph of the syllabus in this case of Hoyt, *supra*, brings to view that other feature here appropriate, to which we have repeatedly alluded, which is expressed thus.

"Time may be implied as essential in a contract from the nature of the subject-matter of the contract. If the thing sold be of *greater or less value according to the efluxion of time, then time is of the essence of the contract, and must be observed in equity as well as at law.*"

In support of this proposition, the court, in the opinion, cites from Fry on Specific Performance, sec. 713, where the author states the rule in the same words which we have quoted from the eighth paragraph of the syllabus in the case of Hoyt *v.* Tewksbury, *supra*.

The language of section 713 it is here worth while to quote:

"Time may be implied as essential in a contract from the nature of the subject-matter with which the parties are dealing. 'If, therefore' (said Mr. Baron Alderson, in

Hipwell *v.* Knight, 1 Yonge & Collyer Eq. Exch., 416), 'the things sold be of greater or less value, according to the effluxion of time, it is manifest that time is of the essence of the contract; and a stipulation as to time must then be literally complied with in equity as well as at law.'"

Section 714 is in these words (Fry on Specific Performance, side page 315):

"So, again, where the subject-matter is, from its nature, exposed to daily variation" [in the case at bar it is exposed to necessary and absolute depreciation by extraction of ores], "the court inclines to hold time to be material, as in the case of sale of stock in a public house, in contracts for annuities on lives, and in purchases of government stock."

In the same note 1 to sec. 1408, page 455, 3 Pomeroy's Eq. Jurisprudence, it is further added that time may become essential from the *unilateral character of the contract.*

In the case at bar the contract is strictly unilateral, so far as it relates to the *only* matter involved in this suit, to wit, the sale; there being no obligation on the defendants below to buy.

To this proposition, the author cites:

Brook *v.* Garred, 3 Kay & Johnson, 608.
2 De Gex & Jones, 62.
Austin *v.* Taney, L. R., 2 Ch., 143.
Kerr *v.* Purdy, 51 N. Y., 629.
Baker *v.* Haverly, 50 Barber, 79.
Potts *v.* Whitehead, 20 N. J. Eq., 55.
Fessler's Appeal, 57 Pa. St., 360.
White *v.* Dobson, 17 Gratt., 262.
Jones *v.* Noble, 3 Bush., 695.
Mason *v.* Payne, 47 Mo., 57.
Estes *v.* Furlong, 59 Illinois, 300.

The case of Christy and Scott's Appeal, 85 Pa. St., 463, decided 1877, by a unanimous decision of the court, is one, in its features here, material exceedingly like the present.

The case is thus described in the head-note:

"C was the owner of a lease-hold property, of five acres, with an oil-well, sand machinery, &c. on it, and leased it to D for ten months with conditions for a sale. D paid $200 in cash, and agreed to pay the balance of the purchase-money in several payments; and when all were made C agreed to make a bill of sale of the property to D. If D failed to make the payments *at the time specified*, his right to the premises was to cease and determine, and the payments made prior to such default were to be treated as liquidated damages. D went into possession, and made but one payment. The property, at the suit of M, was levied upon and sold by the sheriff *as the property of D.* Held, that the *agreement was a lease, with a condition for a sale at the end of the term*, provided, that the payments were made *at the time specified*, and a failure to so make them resulted in a forfeiture of D's rights, and re-investment of the same in C, and that the sheriff's vendee took *nothing* under the levy and sale as the property of D."

Surely this stipulation, in this lease in Scott's Appeal, by which it was agreed that, if D failed to make payments at the time, his rights were to cease, &c., is no stronger in the way of indicating time to be of the essence of the contract than the repeated stipulations contained in Contract A in the case at bar. The Contract A stipulates for the payment of the $40,000 on or before the 27th day of December, 1883; that the deed should not be made *unless* such payment were made at the time named; that if any default were made in payments, or any other respect, "that then it shall be lawful for the said parties of the first part to re-enter, possess, and enjoy the above-described property and premises, and every part thereof, and that the said parties of the second part hereby agree, in the event of such non-performance on their part, to surrender

possession of the said premises upon demand by the said parties of the first part claiming their right to re-enter."

Certainly all these furnish as strong evidence that time was meant to be of essence as do the terms in the lease in Scott's Appeal, *supra*.

The case of Wells *v.* Smith (7 Paige's Chancery Reports, N. Y., 22), found at page 19, Vol. 4, of the edition of Paige's Reports, published by "The Lawyers' Co-operative Publishing Co. of Rochester, N. Y., is accurately described in the head-notes in the following words:

"1. Where a contract for the sale of a city lot contained a provision that the purchaser should, on or before a particular day specified, build and enclose a house upon the front of the lot, or that, in lieu thereof, he should, on that day, pay to the vendor one thousand dollars as the first payment towards the purchase-money; and the contract further provided that if the vendee neglected or failed to perform any of the covenants therein contained, at the times limited for that purpose, all his rights or interest in the premises, either at law or in equity, should cease—

"Held, that the parties had *made payment at the day an essential part of the contract*, and that the vendee, who had not attempted to build a house upon the lot, and who had, without any legal excuse, failed to make the payment at the time specified, was not entitled to a decree for specific performance of the contract.

"2. The vendor is *not bound to tender a deed* of the premises and to demand payment of the purchase-money, *except for the purpose of enabling him to affirm the contract and to recover the purchase-money in a suit at law.* And where the demand for the purchase-money, at a particular day, is made an essential part of the contract, if the vendor shows himself entitled to a specific performance, he must tender, or offer to pay, the money to the vendor at the time specified upon the receipt of a deed of the premises."

The court will observe how like that stipulation in the contract in this case of Wells *v.* Smith, which stipulates

that if the vendee neglected or failed to perform *any of the covenants therein contained*, at the times limited for that purpose, all his rights or interest in the premises, either at law or in equity, should cease, is to the stipulations contained in the Contract A (folios 11, 12, &c.), regarding the first party's absolute right to re-enter, possess, and enjoy the premises, and such party's right to the surrender of the premises by the second party, in the event of default, *in any particular*, by the second party.

Indeed, the provisions of this Contract A, showing a design to make the payment of the $40,000, at the date, are much stronger, at least in the particular that they are *repeated* over and over again, than are the similar provisions in the case of Wells *v.* Smith, *supra*. For example, the obligation on the first party to make a deed is expressly made to be subject to the condition precedent, which is expressed in these words (folio 2): "*Provided*, That said sum of $40,000 shall have been paid on or before the 27th day of November, 1883."

Now, regarding this contract, so set out in the headnote above quoted in the case of Wells *v.* Smith, the Chancellor says:

"And the only questions are, whether upon an executory contract of sale parties may make time an essential part of the contract, so that this court will not relieve against the non-compliance at the date; and whether it was the intention of the parties, in this case, to make the payment of the money on or before the time stipulated an essential part of the contract."

The court then proceeds to find that time was an essential part of the contract, and holds what is expressed in the syllabus as above quoted.

At pages 23 and 24 the court says that if the vendee "wished to comply with the contract so as to have the benefit thereof, he should have tendered the money *at the day*, or have offered to pay the same and to execute the

bond and mortgage for the residue, * * * upon the delivery to him of a deed of the premises. And if he wished time to examine as to the validity of the vendor's title, he should have called for the abstract of title in season to enable his counsel to examine the title before the day upon which the money was to be paid and the conveyances executed. But he *had no right to call upon the defendant to make deeds, or to furnish him with a draft thereof, previous to the time when the deed was, by the terms of the agreement, to be delivered.*"

Again, on the point as to the obligation to make out and tender a deed in that case, the court says:

"The Vice-Chancellor is right in supposing that the defendant was *not bound to prepare and tender the deed until the complainant paid or offered to pay the money.* If she wished to compel a performance of the agreement and to recover the money, in suit at law upon the covenants, it might be necessary, perhaps, that she should have made a tender of the deed, and offered to deliver the same upon the payment of the thousand dollars, and the delivery of a bond or mortgage for the residue of the purchase-money."

This case, therefore, decides two things in the case at bar, if it is followed: One, that as to a contract less strong than the one at bar in its indications of a purpose to make time of the essence of the contract, it is held to have been of that character; the other, is a reply to that part of the opposing brief that is so prominently pressed, beginning at page 15 in subdivision "II," insisting that the appellants had no right to a decree or to possession of the land until *after they, the appellees, had secured the cancellation of the mortgage and tendered a deed for a perfect title.*

We leave this part of the case in regard to whether this is a sale, or, on the other hand, a lease, and whether Contract A makes time of the essence of the contract, and

leave, also, that part of the brief about our being obliged to tender a deed for a clear title, by referring the court to the cases in the note to which we above alluded (4 Desty's Edition of New York Chancery Reports, p. 22), where the author cites to the proposition that "many decisions have treated a *clause of forfeiture*" (such as is found at folios 11 and 12, R., 5, in the present case) "as rendering the stipulated *time of payment essential*, and as, therefore, binding according to its letter, and have refused to give any relief."

The cases cited to said point in that note are really taken from Pomeroy's notes, and they are the following:

Wells *v.* Smith, 2 Edwards Ch., 78 (this being the same case reported in 7 Paige, 22).
Edgerton *v.* Peckham, 11 Paige, 359.
Sanbourn *v.* Woodman, 5 Cushing, 36.
De Camp *v.* Feay, 5 Serjeant & Rawle, 323–326.
Bemington *v.* Irwin, 14 Pa., 145.
Jones *v.* Robbins, 29 Maine, 351.
Clark *v.* Lyons, 25 Illinois, 505.
Snyder *v.* Spaulding, 57 Illinois, 480–484.
McClartey *v.* Gokey, 31 Iowa, 505.
Steele *v.* Branch, 40 Cal., 3.
Farley *v.* Vaughn, 11 Cal., 227.
Rogan *v.* Walker, 1 Wisconsin, 527.

Necessity of a Demand.

To all that part of the brief which cites authority upon the necessity of a demand on the part of the appellees for possession and for a termination of the contract relations, it is sufficient to reply that the demand *was* made; and the fact of such demand is conclusively established, as is, also, the refusal to surrender possession, by finding 18. (R., 23, 24, folio 63.)

But in addition to this reply, another equally con-

clusive is, that the position which asserts that it was needful (in order to obtain the remedy which the plaintiffs below sought, to wit, possession of the premises, restraint from further exhausting the mines, and an accounting) that the plaintiffs below should have tendered a deed and demanded payment of the money, is one which *begs* every material question in this case.

The case of the plaintiffs below was *not* one for recovery of purchase-money—was not one for "specific performance" of a contract—but was one which asserted that the failure of the defendants below to comply with the terms of their option, on the day stipulated, was a fact which *absolutely put an end to all their inchoate or contingent rights in the mines*, and, therefore, the bill was one seeking to exclude them from the mines.

The proposition that in *such* a case as *that* it was necessary for the plaintiffs to tender a deed, or to remove a mortgage, is, as we very respectfully submit, one that is little short of absurd.

It is a position that requires us not only to tender to do the very thing which we were not bound to do, after their default in payment by the 27th day of December, 1883, but also to tender to do that very thing which our contract expressly covenanted we should not, in said event, be required to do, but should, on the contrary, receive immediate and full possession.

If it were true that the defendants below were guilty of no default, that they had so complied with their contract as that a court of equity would specifically enforce it, and we were seeking a specific performance against the defendants below, then such a tender of the deed, with a clear title, would have been necessary. But it was not necessary as a condition to the right to maintain the suit that was brought, to wit, one seeking to rid the premises of the presence of the defendants below, owing to their said default, in a case where time was of the essence of the contract.

No Acquiescence in Appellants' Default.

As to all those parts of the opposing brief which allege *acquiescence* on the part of the plaintiffs below, and waiver of the defaults of the defendants below, the only reply which we deem it needful here to make, is found in findings 15, 16, 17 and 18 (R., 23 and 24), below, which find, expressly, that there was no such acquiescence, nor any such consent on the part of plaintiffs, to said delay, in compliance with the terms of said option. These findings find the facts to be directly the reverse of those upon which appellants base the alleged acquiescence.

Should it so be that this court shall not sustain the position that the finding of facts by the Supreme Court below are conclusive here, and if the court should go into the evidence at large, for the purpose of here finding the facts, then and in that case we shall, if opportunity is afforded, show, in the oral argument in the court, that there was no such waiver of appellants' defaults.

But until this court so rules, we do not deem it proper, much less needful, to enter into a discussion of these facts.

Payment of Half the Ore not an Exercise of the Option to Purchase.

There is one other position in the opposing brief which it may be proper to notice, found beginning page 29, under subdivision IV. That proposition is "that the payment of one-half the proceeds taken from the mines being far in excess of rental, and by the terms of the contract to be applied on purchase-money, was * * * * properly considered, the declaration of the defendants' option to purchase from the time of first payment. It could not have been paid simply as rent, but only because

it also formed part of the purchase-money. A binding contract of sale existed, therefore, from the first payment."

This proposition further adds that—

"If this position just stated be denied, it must be conceded that from the 24th of November, 1883, the date of Exhibit C, the contract of sale existed, because the payments made, and to be made, are therein designated as purchase-money, and defendants thereby agreed to apply interest on the balance of the purchase-money," &c.

Now, the reply to this contention seems to us to be conclusively found in the findings of fact.

The finding 5 (R., 22) finds that they went into possession as tenants; that "all the said moneys so received by plaintiffs were *received as rent* or royalty under and according to the terms of the lease, and were proceeds of ores mined and extracted from the said premises to the said 27th of December, 1883."

To here insist against these findings that these payments of one-half the ore were payments of "purchase-money" from the start, and that the option to purchase was declared and affirmatively accomplished by the first payment made out of said one-half of the ores, is directly and literally the exact opposite of the findings of fact.

But if that were not so, and we were at liberty to look at the contract itself, even then this position becomes a most singular one, not to say an absurd one. If, from the first day that payments were made out of ores extracted, these people had made their election, and were *then* bound as *purchasers* in such sense and way that there was a right of action against them for the $40,000, such conclusion renders frivolous all the provisions of the contract in regard to the defendants below being entitled to stop when they pleased, to surrender the mines whenever they found them unprofitable; that they were only to work the mines "so long as they shall deem fit," &c., &c. They were rendered more than frivolous, were put

an end to, the moment that they paid their *first* ore, and which *first* payment of ore was, by the express terms of the contract (fol. 2), to be paid "as fast as taken out."

This position, therefore, that they were turned into absolute purchasers by the payment of the first ore, is one which puts into the contract an utter *felo-de se* by the destruction which it works of the material provisions of the contract.

This is so plainly so as to make it impossible to make plainer the unsoundness of this position than it is made by the unambiguous and express provisions of the contract.

As to the additional point that Contract C makes the payment of ore from and after the date of the Contract C, payment of "purchase-money," because the words "purchase-money" are used in Contract C, we have already sufficiently remarked, and will not repeat what we have already said upon that point.

We have now, we believe, gone over every material part of the opposing brief, and of this case, and this with quite unnecessary fullness—unnecessary because the findings of fact below are binding upon this court—and, being so, they inevitably result in making proper the affirmance of the decree below.

Our apology for the fullness with which we have gone over the case must, as usual, be found in the earnestness and fullness with which the views of the appellants are pressed in the opposing brief.

SAMUEL SHELLABARGER,
JEREMIAH M. WILSON,
For the Appellees.

In the Supreme Court

OF THE UNITED STATES

THE CITY OF CHARLESTON, *Plaintiff in Error*,

vs.

WILLIAM P. THOMAS, *Defendant in Error*.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR

UPON APPLICATION FOR A SUPERSEDEAS.

In the Supreme Court

OF THE UNITED STATES.

THE CITY OF CHANUTE, *Plaintiff in Error*,
vs.
WILBUR F. TRADER, *Defendant in Error*.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR UPON APPLICATION FOR A SUPERSEDEAS.

CASE STATED.

Wilbur F. Trader, the defendant in error, obtained a judgment in the Circuit Court of the United States for the District of Kansas, against the City of Chanute, successor to the City of Tioga, upon certain bonds and coupons issued by the City of Tioga to the Tioga Flouring Mill Company, a Kansas corporation, and afterward assigned to Wilbur F. Trader, plaintiff below. A bill of exceptions was drawn up and settled, and the judgment was brought here by writ of error, and is now pending.

No supersedeas bond was filed in that case.

Afterward, in July, 1889, Trader applied for a writ of

mandamus to compel the mayor and council of the City of Chanute to levy a tax to pay the judgment. An alternative writ was issued. The City of Chanute, its mayor and council, pleaded to the alternative writ substantially, that the original judgment, to aid in the collection of which the writ was asked, was void because the court rendering it had no jurisdiction of the subject matter, and that the lack of jurisdiction was apparent from the record.

October 14th, 1889, the matter was heard. Defendants introduced the entire record of the original case to show that the judgment was rendered *coram non judice*, and was therefore void. The court, October 14th, 1889, gave judgment awarding a peremptory writ of mandamus returnable November 25, 1889. A bill of exceptions was immediately presented and allowed. A writ of error was also allowed and served, and a citation was issued on October 14th, and was afterward served.

On the same day a supersedeas bond was tendered, which was found by Judge Brewer to be in due form and sufficient in amount for the purposes of a supersedeas. Judge Brewer also found that the sureties were sufficient, but held that the defendant was not entitled to a supersedeas.

The city having complied with all statutory requirements for a supersedeas, asked for a supersedeas, for a stay of the writ, and moved to quash the writ of mandamus, which motions were, each of them, overruled.

The bond approved by Judge Brewer was filed and Trader's attorney was notified that application would be made to the Supreme Court for such order, mandate or writ, as should appear proper to secure the City of Chanute a supersedeas, under the statute.

The record showing all the above facts, the writ of

error and citation, and proof of service of notice of application, are on file in this Court.

It will be observed that the record upon which this application is made begins with the application for a writ of mandamus. The record of proceedings prior thereto is contained in the bill of exceptions as per the clerk's certificate.

BRIEF AND ARGUMENT.

I. The judgment of the circuit court awarding a peremptory writ of mandamus may be reviewed here by writ of error. *Memphis vs. Brown*, 94 U. S. 715; *United States vs. The Mayor of New Orleans*, 8 Fed. Rep. 112; 111 U. S. 716; 105 U. S. 733; 99 U. S. 582; 108 U. S. 543; 97 U. S. 293; 2 Peters 449; High's Extraordinary Legal Remedies, paragraph 557, and cases cited.

This is also the doctrine of the Supreme Courts of New York, Mississippi, Missouri, Texas, South Carolina, Nebraska and Kansas.

II. A writ of error to review such a judgment becomes a supersedeas upon the same conditions as in other cases.

1. There is nothing in the statutes to indicate that judgments awarding writs of mandamus are to be treated differently from other judgments in the matter of supersedeas. Desty Federal Procedure, paragraph 1007. The presumption must be in favor of a stay so far as the statute is concerned.

2. The following cases were cases brought in the Supreme Court to reverse judgments, which awarded peremptory writs of mandamus:

Knox County vs. Aspinwall, 24 Howard, 376: 97 U. S. 393; 105 U. S. 733; 108 U. S. 543; 111 U. S. 716; 5 Wall. 705.

The reports do not show whether proceedings were stayed pending these appeals or not; *but it is obvious that the right of appeal must be in most cases valueless without the aid of a supersedeas.* Appeals in most cases will be impossible unless proceedings below be stayed.

The case of *Memphis vs. Brown*, 94 U. S. 715, is in point. The syllabus in that case is as follows:

"A., having a decree against the City of Memphis for the payment of money, obtained, by judgment rendered March 30th, 1875, a mandamus directing her, for the payment of the decree, to levy a tax upon all the taxable property of the city. She thereupon passed an ordinance levying a special tax of fifty-four cents 'on the $100 worth of property.' Under the laws of the State taxable real and personal property, other than merchants' capital, is embraced in one tax list, and merchants' capital in another. A., finding that such capital was not subjected to the special tax, although it was to that levied for all other purposes, and that the required sum would not be raised, moved for a further peremptory mandamus, requiring such capital, as it was assessed for other purposes in the year 1875, to be included in the property to be taxed for his benefit. Such mandamus was directed by *judgment March 2, 1876.* On the 20th of the following May, the city moved to set aside the latter judgment; but the court refused to grant the motion, and re-entered, on that day, the judgment as the final judgment in the premises. Thereupon the city, within due time, sued out a writ of error, and gave the necessary bond. *Held*, 1. That the court had a right to set aside the judgment of March 2, during the term at which it was rendered, and to re-enter it as of the date when the motion to set it aside was made. 2. That the writ of error was properly

sued out on the re-entered judgment, and is a supersedeas."

It is to be observed that the order of the court which was stayed by the giving of the bond and suing out the writ, was an order granting a peremptory writ of mandamus, issued to aid in the collection of a judgment.

This mandamus was allowed by judgment, dated March 2, 1876. The fact that a motion was afterwards made to set aside the judgment of March 2, 1876, cannot effect the case as to supersedeas.

The Court says in the opinion: "We think that the order made by the circuit court, May 20, 1876, upon a motion to subject merchants' capital to the tax was such a final judgment as may be brought here for re-examination by writ of error. The precise question decided by that order had never been presented in the case."

In the case at bar the question of jurisdiction had never before been raised.

Memphis vs. Brown seems to establish clearly the proposition that a peremptory writ of mandamus, issued to aid in the collection of a judgment, may be stayed precisely as any other judgment may be stayed, and without reference to whether there was a supersedeas bond given in the original case or not, and also without reference to the ground upon which the judgment awarding the mandamus is sought to be reversed. It is for the Supreme Court to pass upon the question of error in awarding the writ in a proceeding subsequent to this.

The question has been passed upon by the United States circuit court in Louisiana. The syllabi in *United States ex rel. Day vs. Mayor*, etc., 8 Fed. Rep. 112, are as follows:

"The amount of the bond to be required by the United States circuit court granting a supersedeas is to be deter-

mined by it, in its sound discretion, under the laws and rules of the Supreme Court."

"In the case of mandamus against the city of New Orleans to direct the levy of taxation, looking to the payment of a specific sum of money, wherein the matter in dispute exceeds the sum of $5,000.00, exclusive of costs, and wherein writs of error are applied for and a supersedeas asked, the bonds required were fixed at $150, plus 10 per cent of the amount of the judgment or judgments sought to be stayed."

It did not appear in this case whether or not the original money judgment had been appealed from. It is obvious that if it had, no supersedeas has been obtained.

The statute and all the cases seem to uphold the right of plaintiff in error to a stay of the writ.

The proposition seems indisputable that plaintiff in error is entitled to a stay until such time as this judgment shall be affirmed or reversed, and that, too, without regard to the merits of the appeal.

If it is thought that the grounds for reversal assigned are insufficient or frivolous, they must be attacked by motion to dismiss. Until that is done a supersedeas should be enforced by this Court.

3. The errors assigned are sufficient.

It seems to plaintiff in error impertinent, on this motion, to say anything as to the grounds of error; but inasmuch as the trial court, in refusing to stay the writ, discussed to some extent the errors insisted upon by plaintiff in error, the following matters are subjoined to this brief:

Plaintiff assigns as errors that the original judgment, to aid in the collection of which the writ is asked, was void, because the court rendering it had no jurisdiction over the subject matter; also, that no execution on that

judgment was ever issued; also, that no demand was ever made upon the city subsequent to the overruling of the city's motion for a new trial; also, that no valid alternative writ was ever issued.

These matters all appear from the record, *and any one of them, except perhaps the last, appears to plaintiff in error sufficient to reverse the judgment awarding the writ; they are not frivolous grounds;* they deserve careful consideration.

The question of the lack of jurisdiction of the subject matter was never raised in the original suit. It was raised for the first time in the pleading to the alternative writ. The application for the writ averred that Trader had a valid subsisting judgment against the city. The city denied this and charged that the judgment was void for lack of jurisdiction over the subject matter, *and that such lack of jurisdiction appeared from the record itself.*

The mandamus cases cited above are treated by the court as separate actions, distinct from the original action in which the money judgment was obtained. But whether they be considered as independent actions or only ancillary proceedings, it is competent to plead that the judgment which formed the basis of the action was void for want of jurisdiction — especially where the want of jurisdiction is apparent from the record. This is true whether it be considered as a direct or collateral attack upon the judgment.

"A judgment pronounced by a tribunal having no authority to determine the matter in issue, is necessarily and incurably void, *and may be shown to be so in any collateral or other proceeding in which it is drawn in question.* When the tribunal has not jurisdiction over the subject matter no averment can supply the defect, no amount of proof can alter the case. As power over the subject

matter is given by law, nothing but an additional grant from legislative authority can extend that power over a class of cases formerly excepted; and neither acquiescence of the parties nor their solicitations can authorize any court to determine any matter over which the law has not authorized it to act." Freeman on Judgments, paragraph 120, page 115, edition of 1881; *Gilliland vs. Sellers, Admr.*, 2 Ohio S. 223; *Morse vs. Presby*, 5 Foster 299; *Eaton vs. Badger*, 33 N. H. 228; *Wamsley vs. Robinson*, 28 La. An. 793; *Ponce vs. Underwood*, 55 Geo. 601; *Lyles vs. Bolles*, 8 S. C. 258; *Dicks vs. Hatch*, 10 Iowa, 380; *State vs. Fosdick*, 21 La. An. 258; *Mora vs. Kuzac*, 21 Id. 754; *Moore vs. Ellis*, 18 Mich. 77; *Damp vs. Town of Dane*, 29 Wis. 419; *Richardson vs. Hunter*, 23 La. An. 255; *Peabody vs. Thatcher*, 3 Col. 275; *Fleischman vs. Walker*, 29 Ill. 318.

The United States Circuit Court is a court of limited jurisdiction, and jurisdictional facts must be pleaded. It appears on the face of the petition that the court was without jurisdiction. The question was not raised in the original suit—why we cannot say; but it is never too late to raise the question of want of jurisdiction over subject matter. When such lack of jurisdiction is shown, the only proper order a court can make is an order of dismissal.

The syllabi in the case of *Moore vs. Town Council of Edgfield*, 32 Fed. Rep. 498, are as follows:

"In an application for a mandamus for the levy of a tax to pay a judgment, it is competent to show that the judgment was obtained *coram non judice*."

"A judgment can be impeached collaterally if the court rendering it was wholly without jurisdiction."

From the opinion of the Court: "The respondent contends that the subject matter of the suit on which judg-

ment was had was not within the jurisdiction of this Court, and that the judgment is void." * * * * *

"But when it appears by an inspection of the record that the court was wholly without jurisdiction—that the matter was *coram non judice*—the judgment is void and of no effect, and must be disregarded. *Elliot vs. Lessee of Piersol*, 1 Pet. 328; *Miller vs. Miller*, 1 Bailey, Law, 244; *James vs. Smith*, 2 S. C. 188; Freem. Judgm. 188. See *Pasteur vs. Lewis*, (La.) 1 South. Rep. 307. This court, it must be remembered, has but a limited jurisdiction in mandamus. Its authority to issue the writ is solely in aid of its jurisdiction. *Bath vs. Amy*, 13 Wall. 244; *Rosenbaum vs. Bauer*, 120 U. S. 450, 7, Supt. Ct. Rep. 633. The first question, then, is, is the matter to be inforced within the jurisdiction of the court? In the present case it is not. Let the rule to show cause be dismissed, and the mandamus be refused."

In the case cited, *Moore vs. Edgfield*, it appears that the court had jurisdiction of the person of defendant (the defendant was a town within the State and district), but did not have jurisdiction of the subject matter, the amount in controversy being too small. See also decision of Justice Miller, reported by Judge Treat, 10 Central Law Journal, 193.

The question as to whether the original judgment was actually void—whether the Court was actually without jurisdiction—need not be discussed here further than to show that the plea is not a frivolous one.

The principal bonds sued upon are not, in our judgment, negotiable in form. They are not payable either "to order" or "to bearer." The bond is peculiarly drawn. The principal bond recites that the coupons are payable to bearer, and the coupons themselves are so drawn; but the principal bonds are not made payable to bearer or to

order. The original payee in the bonds was a resident and citizen of Kansas; and so, if the bonds are not negotiable, the non-residence of the plaintiff did not confer jurisdiction upon the federal court. Desty's Federal Procedure, paragraph 629*a*.

A mere inspection of the record will show that neither this nor the other assignments of error are frivolous, but that they require a hearing and the careful consideration of the Court.

The writ of mandamus was made returnable November 25th, 1889. It will be obvious to the Court that the motion should be determined before that date.

GEO. R. PECK,
C. S. GLEED,
J. W. GLEED,
Attorneys for Plaintiff in Error.

FILED.
NOV 14 1889
JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

THE CITY OF CHANUTE, *Plaintiff in Error*,
vs.
WILBUR F. TRADER, *Defendant in Error*. } No. 1,509.

NOTE.—In general, the plaintiff in error claims that its right to a *supersedeas* does not depend upon the discretion of the Court, but springs from the statute,

Sec. 1007, R. S. U. S

The proceedings in the Circuit Court of Kansas which are claimed to constitute a *supersedeas* are:

1. The bringing of the writ of error.
2. The issuing thereof and accompanying citation and due service. (These facts are conceded in defendant's motion to dismiss, filed November 11, 1889.)
3. Filing a satisfactory bond.

ABSTRACT OF RECORD.

Application for writ of mandamus, July 9, 1889, substantially states that Wilbur F. Trader recovered a judgment against the city of Chanute (the plaintiff in error) on December 4, 1885, for the sum of $7,534.77 damages, and $167.35 costs; that the judgment is still in full force and

effect, and is wholly unpaid; that on July 27, 1888, he served a notice on the defendant as follows:

"To the mayor and councilmen of the city of Chanute, the defendant above-named:

"You, and each of you, are hereby notified that Wilbur F. Trader, the above-named plaintiff, did, on the 4th day of December, A. D., 1885, recover against said defendant (the city of Chanute) in said above entitled action, in the above-named Court a judgment for the sum of $7,534.77 debt besides costs, which said judgment is drawing interest at the rate of seven per cent. per annum from said 4th day of December, 1885, and you are hereby requested to levy a tax on the taxable property within said city of Chanute to pay and satisfy said judgment and costs.

"If you fail to make such levy, an application will be made to said Court for a mandamus to compel the same."

Dated July 27, 1888.

WILBUR F. TRADER,
Plaintiff.
By JOHN HUTCHINS,
His Attorney.

NOTE. It does not appear that execution was issued upon the judgment, or that any demand for payment thereof was made, unless the foregoing is such demand, or that any action was taken by the said Trader between July 27, 1888, and the bringing of the mandamus July 9, 1889. In the meantime the terms of office of mayor and councilmen to whom the above notice was given had expired (see Rev. St. Kansas, chap. 22), and new officials had been elected.

The motion for new trial in original case was overruled after the giving of this notice.

The alternative writ was allowed July 9, 1889.

The answer of the plaintiff in error to the mandamus proceedings is as follows:

And now comes said defendants the city of Chanute

and the mayor and council thereof, by Gleed & Gleed, their attorneys, and by way of plea in abatement of the alternative writ of mandamus heretofore issued say, that they, the said defendants, ought not to be required either to do the things commanded in said writ, or to show cause thereunder, for that the said writ which purports to have been issued and allowed by said Court at the June term, 1889, of said Court, was in fact issued and allowed by a judge of said Court at the city of Topeka in the State and district of Kansas; that the said June term, 1889, of the said Court is required by law to be held at the city of Leavenworth in said State and district of Kansas, and cannot lawfully be held at any other place than said city of Leavenworth.

That the said June term of said Circuit Court was regularly convened at the said city of Leavenworth on the 3d day of June, 1889; that afterward, to wit, on the 14th day of June, 1889, said Court was adjourned to meet on the 19th day of June, 1889, and that said Court was thereafter held and on said 9th day of July, when said alternative writ was issued, was being held at the City of Topeka, State of Kansas. And by way of plea in bar of this action defendant says:

The said judgment against the said city of Chanute recited in said alternative writ is void and of no effect for that the said, the United States Circuit Court for the District of Kansas, which rendered said judgment, had no jurisdiction of the subject matter of the action wherein said judgment was rendered, and no jurisdiction to render said judgment. That such want of jurisdiction appears from the record of, and more particularly from the petition in, the said action.

Wherefore, defendant asks that such alternative writ be quashed, that plaintiff's petition for a peremptory writ be denied, and that defendant have judgment for costs.

GLEED & GLEED,
Attorneys for Defendant.

The petition in the original case of Trader *vs.* the city of Chanute, in which judgment was rendered, and to satisfy which judgment the present proceedings were instituted, is as follows:

"The plaintiff, Wilbur F. Trader, a citizen of the State of Ohio, in the United States of America, complains of the said Tioga township, in the county of Neosho, and State of Kansas, and the city of Chanute, defendants above-named, municipal corporations, organized and existing under and by virtue of the laws of the State of Kansas, and citizens of the said State of Kansas, and for causes of action against said defendants alleges:

"1. That on or about the first day of July, A. D. 1872, the city of Tioga, in said county of Neosho, and State of Kansas, a municipal corporation then duly organized and existing under and by virtue of the laws of said State of Kansas, duly made, executed and issued and delivered its certain negotiable bond with twenty coupons thereto attached, all bearing date of July 1, A. D. 1872, whereby said city of Tioga, for value received, promised to pay, ten years after said date, to the bearer, five hundred dollars, with interest at the rate of ten per cent. per annum, payable semi-annually, on the first days of January and July of each year thereafter as per said interest coupons thereto attached, which said bond, in order to distinguish it from others of like character, was marked No. 1, and of which said bond the following is a copy, to wit:

"$500. Bond of the City of Tioga. No. 1.
Neosho County, State of Kansas,
United States of America.

"Know all men by these Presents, That the City of Tioga, in the County of Neosho, is indebted to the Tioga Flouring Mill Company, in the sum of Five Hundred Dollars, law-

ful money of the United States, with interest from date hereof at the rate of ten per cent. per annum, as provided by law, and payable semi-annually, as per interest coupons hereto attached, the principal being due in ten years from date hereof, and with interest thereon payable at the office of the Farmers' Loan and Trust Company, in the City of New York, to the bearer.

"This bond is issued pursuant to a vote of said City of Tioga, at an election held on the 29th day of June, A. D. 1872, in accordance with the provisions of an act of the Legislature of the State of Kansas, entitled: 'An Act to amend sections 51, 52 and 53 of an act entitled "An act concerning private corporations,"' approved February 28, 1869.

"In testimony whereof, the common council of the said City of Tioga has caused this bond to be issued in the name of said city, and to be signed by its mayor and attested by its clerk, under the seal of said City of Tioga, this first day of July, A. D. 1872.

JOHN B. BEATTY,
Mayor of the City.
Attest: SAMUEL HAMBEL,
Clerk of the City of Tioga."

That on the 16th day of August, A. D. 1872, said bond was duly registered in the office of the Auditor of State of said State of Kansas, and that thereafter, on or about the 20th day of August, 1872, and before said bond or coupons became due and payable, the said bond with said coupons thereto attached, for value received, was sold, assigned, transferred and delivered to this plaintiff, who is now the legal owner and holder thereof.

That there is now due this plaintiff from said defendants on said bond the sum of five hundred dollars, with interest

thereon from January 1, 1873, at the rate of ten per cent. per annum.

2. That among others attached to this bond was a coupon bearing even date therewith, whereby the said city of Tioga promised to pay to the bearer thereof on the 1st day of January, A. D. 1874, the sum of twenty-five dollars, the same being for the interest then and there to become due on said bond, of which coupon the following is a copy, to wit:

"$25.00. No. 3.

"The city of Tioga, Neosho county, State of Kansas, will pay to bearer, at the office of the Farmers' Loan and Trust Company, in the city of New York, twenty-five dollars, for interest due 1st January, 1874, upon bond No. 1 for $500, issued July 1, 1872.

JOHN B. BEATTY,
Mayor.
Attest: SAMUEL HAMBEL,
Clerk of City of Tioga:"

Then follows other similar causes of action, declaring on other bonds exactly like the preceding except as to the register number.

NOTE.—It will be observed that the bond itself is payable to the Tioga Flouring Mill Company, and is non negotiable. The interest only (as evidenced by the coupons) is payable to bearer.

The answer contains—

1. A general denial.
2. The statute of limitations.

The third and fourth paragraphs are as follows:

3. And the said defendant, the city of Chanute, as a further and third ground of defense to all of the pretended

causes of action set forth in plaintiff's petition says, that the various pretended bonds and coupons, purported to have been issued by the city of Tioga, and signed by one John B. Beatty as the mayor of said city, and attested by one Samuel Hambel as the clerk of said city, were so signed and attested without any right or authority therefor on the part of said clerk and mayor, either in law or in fact, and were illegal and void, and created no legal or equitable obligation upon or against said city of Tioga, or upon or against the defendant city of Chanute. That said bonds and coupons set forth in said petition were issued by said city of Tioga without any consideration being received by said city of Tioga therefor, but were issued solely as a donation by said city to the Tioga Flouring Mill Company, which said Tioga Flouring Mill Company was a private corporation, organized solely for the benefit and profit of its incorporators, and not for any public purpose whatsoever.

And said defendant further says that said John B. Beatty, the mayor of said city of Tioga, and the person who purports to sign said pretended bonds and coupons was, on the first day of July, 1872, the time said bonds and coupons are alleged to have been issued by the said city of Tioga, one of the directors and principal officers of said Tioga Flouring Mill Company, and that said John B. Beatty procured said bonds and coupons to be issued in fraud of the rights of the said city of Tioga, and for his, and his coincorporators in said Tioga Flouring Mill Company's own private benefit.

And said defendant further says that said bonds and coupons set forth in said petition were not issued under and in pursuance and in accordance with the provisions of an act of the Legislature of the State of Kansas, entitled "An act to amend sections 51, 52 and 53 of an act entitled 'An act concerning private corporations,' approved February 28, 1869," nor were said bonds issued under and in pursuance of any act of the Legislature of the State of Kansas what-

soever. That the said plaintiff herein had full knowledge and notice that the said bonds and coupons were so as aforesaid illegal and void, and that they were issued by said city of Tioga without any authority of law, and only as a donation to said Tioga Flouring Mill Company; that the said Tioga Flouring Mill Company, to whom said bonds were so fraudulently issued, was a private enterprise of its incorporators, and not organized for a public purpose, and all of the foregoing facts stated herein, before any of said bonds and coupons came to him and became his property; that all of said bonds and coupons in said petition set forth and described were received and taken by said plaintiff with a full and complete understanding, knowledge and notice that they were issued by the city of Tioga without any authority of law, and that said bonds and coupons were illegal and void.

And said defendant further says that it denies that said plaintiff is the owner and holder of said bonds and coupons before their maturity, but alleges the fact to be that said plaintiff acquired the ownership thereof long after they were due and payable, and with full and complete notice of all their defects and illegalities.

4. And said defendant further answering, and as a fourth ground of defense, and by way of plea to the jurisdiction of this Court as a court of law to take cognizance of this cause of action says, that the city of Chanute embraces within its corporate limits more than 360 acres of land, a very small portion of which, not to exceed 80 acres, comprises the territory formerly embraced within the city of Tioga, and that said city of Chanute does not include all of the territory embraced within the city of Tioga at the date of the issue of said alleged bonds, but only a portion thereof.

Wherefore said defendant prays judgment against said plaintiff for its costs in this behalf most wrongfully sustained.

The other proceedings in the original cause are:

December 4, 1885. Judgment for plaintiff for $7,534.77.
December 5, 1885. Motion for a new trial.
December 4, 1888. Motion for a new trial heard and overruled.
December 7, 1888. Defendant given 30 days to prepare bill of exceptions.
February 6, 1889. Bill of exceptions allowed at same time at which motion for new trial was overruled.

The bill of exceptions contains a full copy of record in the original case. Among other matter it appears that the Tioga Flouring Mill Company is a Kansas corporation.

In the present proceeding plaintiff in error filed his writ of error October 14, 1889, served the same and citation—filed as bond to obtain a *supersedeas* under Sec. 1,007, R. S. U. S. The action of the Court in the bond is as follows:

"And now on this 14th day of October, A. D. 1889, comes the said defendant and tenders a bond in the sum of $10,000, which is by the Court found sufficient in amount for the purpose of a *super sedeas*, and which is by the Court found to be in due form and which is approved as to the sufficiency of the sureties.

And the said defendant moves, asks and requests the Court that the said bond be approved and filed and that the peremptory writ this day issued in said cause be stayed, that a *super sedeas* be granted, and the said peremptory writ of mandamus be quashed and the Court thereupon takes the said matter under advisement."

"And now, on this 21st day of October, A. D., 1889, the Court having duly considered the motion of defendant to stay the peremptory writ of mandamus heretofore awarded and to grant a *super sedeas* herein, and to quash the writ,

the said motions and each of them are hereby overruled, to which ruling of the Court the said defendant duly excepts."

DAVID J. BREWER,
Circuit Judge.

NOTE. A brief and, for present purposes, satisfactory statement of the objections to the issuance of the peremptory writ of mandamus will be found in the motion to dismiss filed by defendant in error November 19, 1889.

GLEED & GLEED,
Attorneys for Plaintiff.

A. G. SAFFORD,
Of Counsel.

LAW REPORTER PRINT

Office Supreme Court U. S.
FILED.
NOV 11 1889
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

THE CITY OF CHANUTE,
Plaintiff in Error,

vs.

WILBUR F. TRADER,
Defendant in Error.

No. 1509.

This case below was an application for mandamus, in which the court, on the 14th day of October, 1889, granted a peremptory writ requiring the mayor and councilmen of the City of Chanute, plaintiff in error, to levy a tax sufficient to pay and discharge a judgment rendered in favor of the defendant in error on the 4th day of December, 1885, for the sum of $7,534.77.

No writ of error or supersedeas was sued out in said cause in which said judgment was rendered, nor any bill of exceptions made, taken, or allowed until after the expiration of more than two years after the term at which said judgment was rendered, as hereinafter stated.

On or about the 27th day of July, 1888, the said Trader, defendant in error, requested plaintiff in error, in writing, to levy a tax to pay said judgment, which they failed and refused to do. Defendant in error then gave notice that he would apply, and thereafter did apply, to the court in which the said judgment then and there remained wholly unsatisfied, unappealed, and unreversed, for an alternative writ of mandamus, requiring

the said officers of said municipal corporation to levy a tax for the satisfaction of said judgment. Said alternative writ was duly issued, made returnable on the 2d day of September, 1889.

An answer was filed by the respondents to the said alternative writ, in which they set up that "the said judgment against the said City of Chanute recited in said alternative writ is void and of no effect, for that the said, the United States Circuit Court for the district of Kansas, which rendered said judgment, had no jurisdiction of the subject-matter of the action wherein said judgment was rendered, and no jurisdiction to render said judgment. That such want of jurisdiction appears from the record of, and more particularly from, the petition in the said action."

The hearing was continued to October 14, 1889.

Upon and after the hearing upon said writ and return, the court below granted a peremptory writ of mandamus, requiring said officers to levy the said tax according to the directions and terms of the said alternative writ.

Upon and after the issuing of the said peremptory writ of mandamus, the plaintiff in error presented a bill of exceptions, which was allowed, and which appears in the record, and asked for a writ of error, which was allowed, and citation served on the attorney for the defendant in error on the 2d day of November, 1889.

The only grounds upon which the said writ of error is prosecuted in this court are as follows, as appears by the said record:

First. The court below erred in holding that the court below had jurisdiction to render the judgment, to collect which said writ of mandamus was allowed.

Second. The court below erred in not holding that said judgment was void for lack of jurisdiction.

Third. The court below erred in holding that said court had jurisdiction to issue said writ of mandamus.

Fourth. The court below erred in allowing a writ of mandamus when no execution had ever been issued.

Fifth. The court below erred in allowing a writ of mandamus when no demand had been made upon plaintiff in error, subsequent to the overruling of plaintiff's motion for a new trial.

Sixth. The court below erred in giving judgment for defendant in error.

Seventh. The court below erred in not giving judgment for plaintiff in error.

Eighth. The court below erred in refusing plaintiff in error a *supersedeas*, and in refusing to stay the peremptory writ of mandamus.

The only ground on which the want of jurisdiction to render said judgment was and is based, as will appear by the record and by the brief of the plaintiff in error, is the allegation by such plaintiff that the bonds and coupons on which said judgment was rendered were and are not payable to bearer, and that the original payee thereof is a citizen of Kansas, the same State with the plaintiff in error; whereas the said bonds and coupons are shown by the face of said record to be payable to bearer in the following words:

"*Know all men by these presents*, That the City of Tioga, in the county of Neosho, is indebted to the Tioga Flouring Mill Company, in the sum of *five hundred dollars*, lawful money of the United States, with interest from date hereof, at the rate of ten per cent. per annum, as provided by law, and payable semi-annually, as per interest coupons hereto attached, the principal being due in ten

years from date hereof, and with the interest thereon payable at the office of the Farmers' Loan and Trust Company, in the city of New York, to bearer."

Upon and in view of the said alleged errors, the defendant in error now comes and says that it is evident from the said record that this writ of error is prosecuted for delay, and that the grounds therefor are frivolous, and, therefore, the defendant in error moves the court to dismiss the same, under rule 6, and to affirm the judgment below, granting the peremptory writ of mandamus, and refusing the allowance of a supersedeas.

John Hutchins

Stella Largen & Olsen

Att'ys for deft

Supreme Court U. S.
FILED.
NOV 22 1899
JAMES H. MCKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

THE CITY OF CHANUTE, Plaintiff in Error,

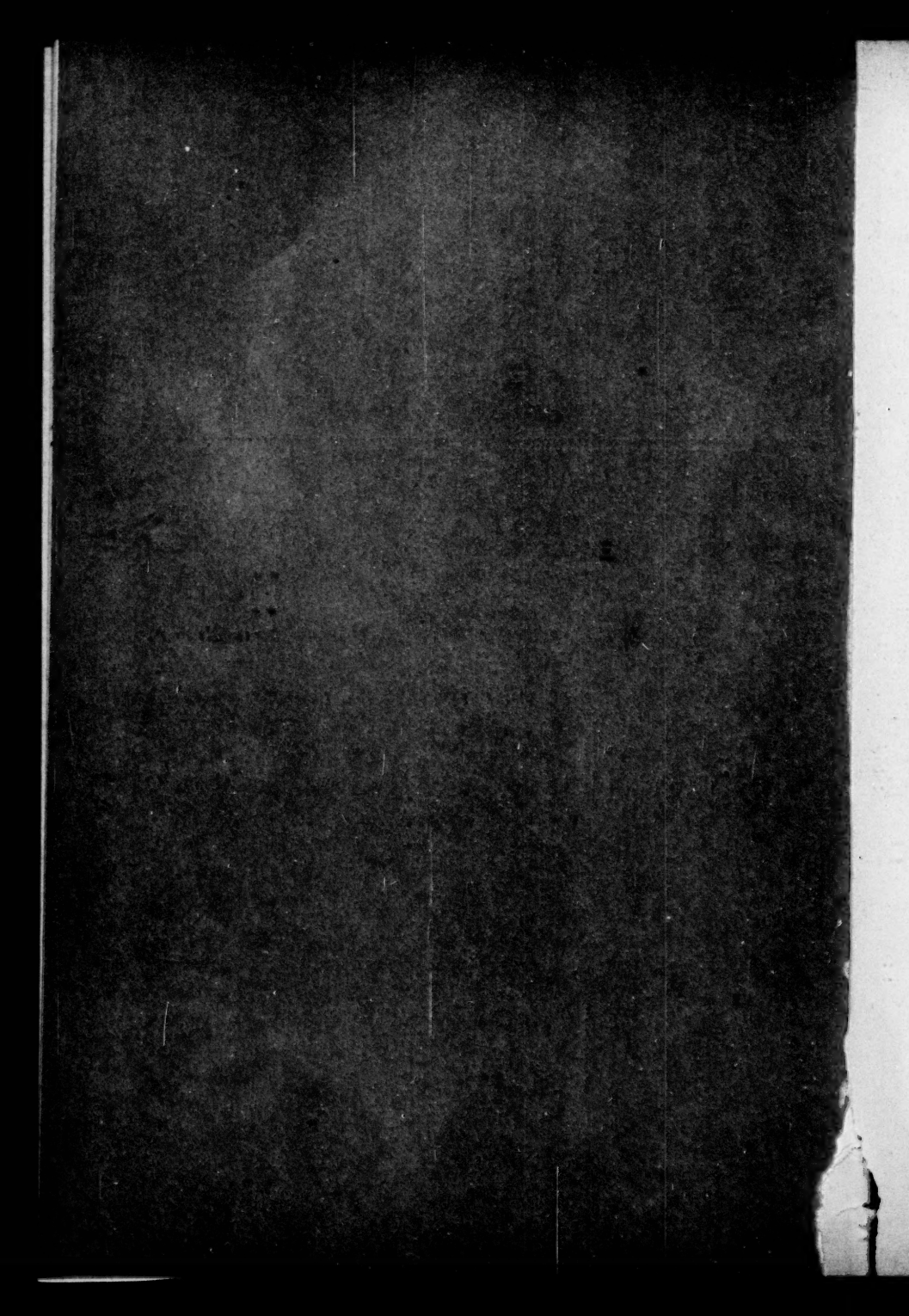
vs.

WILBUR F. TRADER, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS AND AFFIRM

SHELLABARGER & WILSON,
JOHN HUTCHINGS,
Atty's for Def't in Error.

P. T. Foley, Printer and Binder, Lawrence, Kansas.



IN THE

Supreme Court of the United States.

THE CITY OF CHANUTE,
Plainitff in Error,

vs.

WILBUR F. TRADER,
Defendant in Error.

No. 1509.

STATEMENT OF CASE.

On the 4th day of December, A. D. 1885, Wilbur F. Trader, the defendant in error, recovered a judgment against the plaintiff in error, the City of Chanute, on municipal bonds for the sum of $7,534.77 and costs, in the Circuit Court of the United States for the District of Kansas.

On the 27th day of July, 1888, no writ of error having been sued out on said judgment, and the same standing on the records of said Court wholly unpaid, the defendant in error, in writing, requested the mayor and councilmen of said plaintiff in error, to levy a tax on the taxable property within the said City of Chanute, to pay and satisfy said judgment and costs.

The time for making the regular levy having passed, and the said mayor and councilmen having neglected and refused to levy the tax to pay the judgment

and costs as requested, the said defendant in error gave notice that he would apply to the Court in which said judgment was rendered, on the 9th day of July, 1889, for an alternative writ of mandamus, requiring the said officers of said muncipal corporation to levy the said tax.

On the said 9th day of July, 1889, the defendant in error made such application to the said Court and the alternative writ was then issued and made returnable on the 2nd day of September following, at which time the plaintiff in error, and its mayor and councilmen appeared by their attorneys, Gleed & Gleed, and made and filed the following return or answer to said writ:

"And now comes said defendants, the city of Chanute, and the mayor and council thereof, by Gleed & Gleed their attorneys, and by way of plea in abatment of the alternative writ of mandamus heretofore issued say that they, the said defendants, ought not to be required either to do the things commanded in said writ, or to show cause thereunto;

1. For that the said writ which purports to have been issued and allowed by said Court at the June term, 1889, of said Court, was in fact issued and allowed by a Judge of said Court, at the city of Topeka, in the State and District of Kansas; that the said June term, 1889, of the said Court, is required by law to be held at the city of Leavenworth, in said State and District of Kansas, and cannot lawfully be held at any other place than said city of Leavenworth.

That the said June term of said Circuit Court was regularly convened at the said City of Leavenworth on the 3rd day of July, 1889; that afterward, to-wit: on the 14th day of June, 1889, said Court was adjourned to meet on the 19th day of June, 1889. and that said Court was thereafter held, and on said 9th day of July when

said alternative writ was issued, was being held at the City of Topeka, State of Kansas.

And by way of plea in bar of this action defendant says:

11. The said judgment against the said city of Chanute recited in said alternative writ, is void and of no effect for that the said, the United States Circuit Court for the District of Kansas, which rendered said judgment had no jurisdiction of the subject matter of the action wherein said judgment was rendered, and no jurisdiction to render said judgment. That such want of jurisdiction appears from the record of, and more particularly from the petition in, the said action.

Wherefore, defendants ask that such alternative writ be quashed, that plaintiff's petition for a peremptory writ be denied, and that dependants have judgment for costs."

No further answer or return to the said alternative writ was made by said plaintiff in error, or its mayor and councilmen, and no other issues were joined or presented on the hearing thereafter had. The hearing was adjourned to October 14th, 1889, at which time the respondents in support of their answer introduced the record previously made in the case showing copies of the bonds and coupons upon and for the contents of which the said judgment was rendered. No other evidence was offered by the respondents and no other question raised or discussed.

It was contended by respondents that the peremptory writ should not be allowed because the said bonds were not negotiable, or payable to bearer, and that consequently the holder, a non-resident of Kansas and a citizen of Ohio, could not maintain an action thereon in

the Circuit Court of the United States, and that the judgment rendered thereon was therefore void for want of jurisdiction in the Court of the subject matter.

The grounds of error assigned by plaintiff herein are printed in our motion to dismiss.

BRIEF FOR DEFENDANT.

The judgment, the collection of which is sought to be prevented by this writ of error, was rendered December 4th, 1885. No attempt was made to procure a bill of exceptions in the case until January, 1888, more than three years after the date of the judgment. A bill of exceptions was signed and filed February 5th, 1888, and thereafter a writ of error sued out.

Upon the hearing for a peremptory writ of mandamus on October 14th, 1889, the respondent, plaintiff in error, to support its return to the alternative writ, introduced the said bill of exceptions in evidence and offered no other or further evidence.

From the copies of the bonds therein contained the respondent claimed that it appeared the said judgment was obtained *coram non judice*, and was therefore void and not capable of enforcement.

The Court below held otherwise and ordered the peremptory writ, to reverse which action this writ of error was sued out.

The question thus raised we maintain is too frivolous to need further argument. Upon the face of the bonds it is plainly provided that the principal thereof shall be due in ten years from date, and with the interest thereon payable at the Farmers' Loan and Trust

Company, in the City of New York, to bearer. How can it be said that such instruments are not negotiable and do not pass by delivery? The *customary method* of indicating or determining the negotiability of a bill or note is by the use of the words "bearer" or "order," though no particular words are necessary. Words in a bill or note from which it can be inferred that the party making it intended it to be negotiable, will give it a transferable quality.

1 Daniel on Negotiable Instruments; Sec. 106.

Raymond vs. Middleton, 29 Penn. St., 530

Sinclair vs. Johnson, 85 Ind., 527.

Is not such intention not only inferable from the language of the bonds in question but clearly expressed thereby?

But we contend that if it were held that the bonds were not negotiable the judgment would not be void, but would stand as a good judgment, conclusive on the parties until reversed or vacated by the tribunal having jurisdiction to pass upon the question of error.

The case is not analagous to one where jurisdiction of the subject matter is absolutely and totally withheld. The jurisdiction of the Circuit Courts of the United States in actions of a civil nature at common law, is conditioned upon the existence of certain facts which the Court must decide; as in this case whether the bonds were negotiable or not. An erroneous decision on this point would not render the judgment void, but simply erroneous, subject to reversal by this Court in a proper proceeding for that purpose.

Roderigas vs. The East River Saving Institution, 63 N. Y., 460.

The Court below had jurisdiction if the citizenship of the parties was right for it; consequently, the question of jurisdiction related to the parties rather than to the subject matter.

The objections to the writ of mandamus that no execution had been issued on the judgment, and that no demand had been made subsequent to the overruling of plaintiff's motion for a new trial, were not raised by the return or answer of plaintiff in error to the alternative writ in the Court below, and if under any circumstances such objections would be valid, they were certainly waived by not being raised before trial on the merits.

2 Dillon on Municipal Corporations, note to Sec. 696.

But it was not necessary to issue execution before making application for the mandamus. There is no law in Kansas requiring execution to be issued on judgments against municipal corporations and returned *nulla bona* before a mandamus to enforce their collection.

The last paragraph of Section 53 of the act of the Kansas Legislature, under the provisions of which the bonds herein questioned were issued, reads as follows:

And it shall be the duty of the Board of County Commissioners, or City Council, or Town Trustees of any such county, or city or town, so taking and subscribing stock in any railway company, and in issuing bonds in payment thereof, as aforesaid, to annually levy, or cause to be levied, and collect, or cause to be collected, at the time and in the manner that general

taxes are collected, a tax sufficient to pay the annual interest on such bonds, and create a sinking fund for their redemption, and the amount so levied and collected shall be kept apart from any other funds, and appropriated to no other purpose than to pay said interest and redeem said bonds.—Laws of Kansas 1869, page 110.

This act was recited in the bonds and was incorporated into and became a part of the contract, and mandamus was the only remedy the bondholder, the plaintiff below, had for plaintiff in error's refusal to levy and assess the tax thus provided for the special purpose of paying his bonds.

"When the law under which the debt was incurred provides for the levy of a special tax to pay it, this duty will be enforced by mandamus, and in such a case it is no answer to an application for this remedy that an execution has not been returned *nulla bona*, or that the corporation debtor may have property subject to a sale on execution."

2 Dillon on Municipal Corporations; Sec. 687.

Knox County vs. Aspinwall; 65 U. S. (24 How.) 376.

We respectfully submit that upon the record in this case, it clearly appears that the writ of error was taken for delay only; that the grounds therefor are frivolous, and that the defendant's motion to dismiss the writ ought to be sustained and the order of the Court below, directing the peremptory writ of mandamus, affirmed.

SHELLABARGER & WILSON,
JOHN HUTCHINGS,
Attorneys for Defendant in Error.